No. 75-227

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In the Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL POWER COMMISSION, PETITIONER

v.

CONSUMER FEDERATION OF AMERICA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CONSUMER FEDERATION OF AMERICA, ET AL.

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The Solicitor General, on behalf of the Federal Power Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-30a) is reported at 515 F. 2d 347. The initial order (No. 491) of the Federal Power Commission (App. C, *infra*, pp. 33a-41a), its order (No. 491-A) modifying procedures on reconsideration (App. D, *infra*, pp. 42a-75a), its order (No. 491-B) on reconsideration (App. E, *infra*, pp. 76a-104a), and its

order (No. 491-C) denying rehearing (App. F, *infra*, pp. 105a-109a) are reported at 50 FPC 742, 848, 1463, and 1634, respectively.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1975 (App. B, *infra*, pp. 31a-32a). On June 4, 1975, the Chief Justice extended the Commission's time for filing a petition for writ of certiorari to and including July 11, 1975. On July 2, 1975, Mr. Justice White further extended the Commission's time for filing a petition for a writ of certiorari to and including August 10, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the Federal Power Commission has authority under the proviso of Section 7(c) of the Natural Gas Act, 15 U.S.C. 717f(c), to exempt from normal certification requirements emergency short-term sales of natural gas to pipelines experiencing a supply shortage, when the rates of such sales will ultimately be reviewed by the Commission under the standards of Sections 4 and 5 of the Act.

STATUTES INVOLVED

Sections 4, 5, 7, and 16 of the Natural Gas Act, as amended, 15 U.S.C. 717c, 717d, 717f, and 717o, are set forth in Appendix G, *infra*, pp. 110a-119a.

STATEMENT

The court of appeals set aside orders of the Federal Power Commission amending certain of the Commission's regulations under the Natural Gas Act, 52 Stat. 821, *et seq.*, as amended, 15 U.S.C. 717, *et seq.* The amendments were designed to minimize the immediate impact on natural gas consumers of an acute supply shortage during the 1973-1974 winter heating season by permitting pipelines experiencing system shortages during that season to make emergency short-term purchases of natural gas without Commission certification under Section 7(c) of the Act, 15 U.S.C. 717f(c).

1. In Order No. 491 (App. C, *infra*, pp. 33a-41a) —issued on September 14, 1973, without prior notice or hearing because of the need for immediate action (*id.* at 34a)—the Commission invoked its authority under the proviso of Section 7(c) to "exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest." It amended its regulations under the Act to extend from 60 days to 180 days the period within which a pipeline experiencing a system shortage may make emergency purchases of natural gas without Commission certification under Section 7.[1] The order provided that these amendments would be effective only until

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[1] Sixty-day authority had been in effect for the prior three years (44 FPC 1574).

March 15, 1974, the end of the winter heating season (*id.* at 40a).

The Commission acted on the basis of a staff report that had forecasted intensified shortages during the 1973-1974 winter heating season, leading to severe pipeline curtailments in several regions of the country. The order stated (*id.* at 37a):

> Such curtailments will result, as they did last year, in severe economic and environmental consequences, resulting in the closing of schools and factories, the denial of utility service to new customers, the utilization by industry and electric utilities of alternate fuels which impact upon ambient air quality standards, and the transfer of unfulfilled demand to other fuels in short supply with the resultant upward price pressures.

2. On September 25, 1973, after the filing of applications for rehearing, the Commission issued Order No. 491-A (App. D, *infra*, pp. 42a-75a), in which it reaffirmed and further documented its judgment that the gas shortage would result in severe economic injury during the impending winter season (*id.* at 44a-50a). The order explained that it was necessary to extend the emergency purchase period from 60 days to 180 days in order to assure sellers "a more definite market" for their gas and thereby to make interstate sales more attractive to them (*id.* at 52a). The Commission stated that it would "closely monitor and review the results of these emergency procedures * * * and will determine whether any modification is necessary to serve the public interest" (*id.* at 54a).

The Commission also indicated that it would determine whether the rates of emergency pipeline purchases are just and reasonable by reviewing the pipelines' purchased gas costs in pipeline rate proceedings. "[T]he rates at which any emergency purchases are made pursuant to this order will be subject to our full regulatory review subject to Sections 4 and 5 of the Natural Gas Act" (*id.* at 56a).[2]

3. On November 2, 1973, after the submission of comments by interested parties, the Commission issued Order No. 491-B (App. E, *infra*, pp. 76a-104a) modifying Order No. 491 in part but reaffirming the extension of the emergency purchase period to 180 days. The order stated that "a six month sale is often necessary in order to justify the financial investment necessary to secure a sizable package of gas for the interstate market" (*id.* at 83a). Moreover, "sales over a six-month period will assure that the supplies thereby elicited will be available throughout the winter heating season and not for just a part thereof" (*id.* at 84a). The order referred to statistics showing that Order No. 491 had already elicited a substantial amount of gas that would not otherwise have been available for the interstate market,

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[2] The order also provided that, while the effectiveness of Order No. 491 would not be deferred, interested persons could promptly file written comments concerning the emergency measures, and the Commission would issue a further order in light of those comments (App. D, *infra*, p. 54a). On October 3, 1973, the court of appeals stayed Order No. 491 pending final action by the Commission after receipt of the public comments invited by Order No. 491-A.

and that the order had resulted in no increase in the average cost of the gas (*id.* at 85a-86a).

Order No. 491-B also discussed in detail the Commission's authority to extend the emergency purchase period to 180 days and answered the contentions of some parties that the Commission's action amounted to impermissible deregulation (*id.* at 87a-95a). It emphasized that consumers would be fully protected against unreasonable price increases, because the Commission "will scrutinize the rates of all emergency purchases in the review of purchased gas costs in pipeline rate proceedings" and "will permit the pipeline to pass on to the consumer the rates of emergency purchases *only* when such rates can be shown to have been required by the public interest" (*id.* at 91a; emphasis in original).[3]

In addition, the Commission stated that it would closely monitor volumes and prices of all emergency sales and would be free "to initiate such action as may be required with respect to specific sales which appear to be inconsistent with the public interest" (*ibid.*). Finally, the order expressed the Commission's judgment that any price increase that might result from the extension to 180 days would be minimal and, in view of the severe economic impact of the shortages that would otherwise occur, justified in the public interest (*id.* at 93a-95a).

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[3] Thus, while the *producers* would not be required to refund collected rates that were later determined to be too high (App. E, *infra*, p. 92a), the consumer would not bear the cost burden of a pipeline's unreasonable purchases.

4. On November 6, 1973, several parties who had previously filed petitions for review of Order No. 491 applied to the court of appeals for a stay pending review. The court of appeals granted a stay on December 10, 1973, but this Court vacated it on December 20, 1973 (414 U.S. 1117).

5. The court of appeals thereafter set aside the Commission's orders (App. A, *infra*, pp. 1a-30a). It held that the exemption authority conferred on the Commission by the Section 7(c) proviso is applicable only to innocuous temporary purchases "for which a hearing would be superfluous" (*id.* at 15a); it may not properly be used "to excise [from the certification requirement] large-volume, long-duration, widespread deliveries of gas" like those contemplated by the Commission's orders (*id.* at 17a).

The court also held that the Commission's indirect method of determining the reasonableness of the rates charged by producers for emergency pipeline purchases was inadequate under the principles of this Court's decision in *Federal Power Commission* v. *Texaco, Inc.*, 417 U.S. 380, because the orders fail "to insure that the rates paid to producers [are] just and reasonable" (App. A, *infra*, p. 23a), fail to "set forth [the] standard of indirect regulation with 'requisite clarity' to provide assurance that the rates ultimately borne by the consumer are just and reasonable' " (*id.* at 25a), and fail "to provide pipelines with standards to guide them in latitude contemplated in contracting for emergency purchases" (*id.* at 26a).

REASONS FOR GRANTING THE WRIT

This case presents an important issue concerning the Federal Power Commission's authority under the Natural Gas Act to adopt effective measures to permit natural gas pipelines to make emergency, short-term purchases of gas during periods of high demand when they experience a system shortage. The court of appeals construed the proviso to Section 7(c) of the Act in a way that effectively negates the exemptive authority conferred upon the Commission.

Although the administrative orders at issue here expired in March 1974, the statutory question has continuing urgent importance in the administration of the Act. Prompt resolution of that question by this Court is needed to permit the Commission effectively to fulfill its statutory responsibilities in the face of a chronic shortage of natural gas that becomes particularly acute during winter heating periods.

1. The proviso to Section 7(c) of the Act gives the Commission authority to depart from the normal certification procedures in two situations. First, the Commission "may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate * * *." Second, the Commission "may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest."

Whereas the temporary certificate clause applies to emergency operations that are intended to be permanent, the exemption clause applies to operations that are intended to meet transitory needs. The Commission's orders in the present case are bottomed upon its exemptive authority rather than its temporary certificate authority.

The Commission has always construed the exemption clause to apply to large-scale, temporary purchases necessary to meet emergency needs.[4] Nothing in the language or history of the Act precludes that interpretation.[5]

All that the meager legislative history reveals is that the Section 7(c) proviso was designed to permit the Commission to respond effectively to emergencies that threaten the maintenance of adequate service.[6]

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[4] See Order No. 148, 14 Fed. Reg. 682 (1949); Order No. 192, 21 Fed. Reg. 9166 (1956); Order No. 193, 21 Fed. Reg. 9167 (1956); Order No. 280, 29 Fed. Reg. 4879 (1964); Order No. 391, 34 Fed. Reg. 17331 (1969); Order No. 418, 35 Fed. Reg. 19174 (1970).

[5] Even if the court of appeals correctly inferred that the temporary certificate authority was meant to apply only to small-scale operations (App. A, *infra*, pp. 13a-14a), there is no support for its further inference (*id.* at 14a-15a) that the exemption authority must be applicable only to even smaller-scale operations. An assumed purpose to limit the Commission's authority with respect to transactions of extended duration, which may induce long-term consumer reliance, does not necessarily or even probably imply a purpose to impose the same limitation with respect to transactions of relatively brief duration.

[6] See letter from Leland Olds, Chairman, Federal Power Commission, to Clarence F. Lea, Chairman, House Committee

The proviso should be read, in accordance with that purpose, to permit an effective response to the chronic seasonal emergencies that we are now experiencing, even though such chronic emergencies may not have been foreseen by Congress when it enacted the legislation.

As this Court stated in *Permian Basin Area Rate Cases*, 390 U.S. 747, 776, "the width of administrative authority must be measured in part by the purposes for which it was conferred," and "the Commission's broad responsibilities therefore demand a generous construction of its statutory authority." The court of appeals' "narrow construction" (App. A, *infra*, p. 19a) of the Commission's exemptive authority would leave the Commission largely powerless to take the extraordinary steps that may be necessary to fulfill its broad responsibility to ensure the maintenance of adequate service during periods of acute shortage and heavy demand.

2. That result is not required by "the overall purpose of § 7 to provide a scrutiny [of rates] needed in the public interest" (*ibid.*). Although the certification process ordinarily serves the important function, pending subsequent full-scale rate review, of ensuring that a producer's initial price is consistent with the public interest, the regulatory scheme es-

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on Interstate and Foreign Commerce, dated August 2, 1941, reproduced in Hearings on Natural Gas Amendments before the House Committee on Interstate and Foreign Commerce, 77th Cong., 1st Sess. 81 (1941); see also H.R. Rep. No. 1290, 77th Cong., 1st Sess. 3, 5 (1941).

tablished by the Commission's orders in this case reduces the need for that initial rate scrutiny.

In ordinary circumstances, an unreasonably high initial rate could substantially burden the consuming public for many years before the Commission's plenary rate review procedures could be concluded; scrutiny at the certification stage is for that reason essential. But the emergency purchase procedure involved here provides for full rate review by the Commission at the pipeline level under the rate standards of Sections 4 and 5. Since the Commission will not allow any unreasonably high producer rate to be passed on to the consumer by the pipeline, the consumer is assured of full protection notwithstanding the absence of an initial price scrutiny at the certification stage.

3. The scheme of indirect rate regulation established by the Commission's orders is valid under the principles of *Federal Power Commission* v. *Texaco, Inc.*, 417 U.S. 380. The Court there held that "the Commission is free to engage in indirect regulation of small producers by reviewing pipeline costs of purchased gas, providing that it insures that the rates paid by pipelines, and ultimately borne by the consumer, are just and reasonable" (*id.* at 401). The Court set aside the Commission's order in that case, however, because the order did not provide with "requisite clarity" (*id.* at 397) that the "just and reasonable" standard of Sections 4 and 5 would govern the Commission's producer rate review at the pipeline level.

There is no such deficiency in the present orders. They unambiguously provide that "the rates at which any emergency purchases are made pursuant to this order will be subject to our full regulatory review subject to Sections 4 and 5 of the Natural Gas Act" (App. D, *infra*, p. 56a). The Commission has accordingly suspended numerous proposed rate increases filed by pipelines seeking to flow through the cost of gas purchased under the orders involved in the present case,[7] and its suspension orders clearly reflect that the just and reasonable standard of Sections 4 and 5 is to be controlling.[8]

Although Order No. 491 does not separately enumerate the considerations that the Commission will take into account in determining whether an emergency purchase rate is just and reasonable, the statutory standard has been given content over the years, and no person knowledgeable in the industry would

[7] The court of appeals erroneously stated that "[u]nder [purchased gas adjustment] clauses pipelines may be able to pass on their increased gas expenses from Order 491 purchases without filing a rate increase under § 4" (App. A, *infra*, pp. 25a-26a, n. 72). The fact is that every proposed rate change by a pipeline, even under an approved purchase gas adjustment clause, must be filed with the Commission under Section 4 of the Act and is subject to suspension, investigation, and review by the Commission. See 18 C.F.R. 154.38(d)(4)(iv); Order No. 452-A, 47 FPC 1510, 1510-1511.

[8] See, *e.g.*, *El Paso Natural Gas Co.*, Dkt. Nos. RP72-155, *et al.* (order issued March 29, 1974), in which the Commission suspended a proposed pipeline rate increase because "[o]ur review of the proposed rate increase indicates that all of the purchased gas costs comprising such rate have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or otherwise unlawful" (pp. 1-2).

likely be mystified by its application here. Moreover, recent orders setting hearing dates in pipeline rate increase proceedings give clear guidance concerning the relevant considerations.[9]

4. Although the 180-day emergency purchase procedures established by the orders in this case were terminated in March 1974, the question presented by this petition is of substantial continuing importance to the administration of the Act.[10] The emergency procedures, while they were in effect, attracted significant increased supplies to the interstate market.[11]

There is no dispute that supply shortages in forthcoming winter heating seasons will be at least as

[9] For example, in *Northern Natural Gas Co.*, Dkt. Nos. RP71-107, *et al.* (order issued July 7, 1975), the Commission directed the respondent producers to submit cost evidence relating to their emergency sales, and directed the respondent pipeline to "submit evidence as to (1) its need for the gas, (2) the availability of other gas supplies, (3) the amount of gas purchased from the producer involved under the emergency provisions of Order No. 491, as amended, (4) the rates of other producer sales under Order No. 491 approved for flow through, and (5) the prevailing prices in the area for both interstate and intrastate sales of gas" (p. 3).

[10] The case is not moot. As the court of appeals' opinion indicates, the Commission will be required on remand, if the court's judgment is sustained, to consider whether producers that sold gas under the orders should be required to refund to purchasing pipelines any portion of the price that was in excess of the just and reasonable rate.

[11] The Commission's data show that the 180-day procedure elicited approximately 196 million Mcf of gas in the period September 1973 to September 1974. By comparison, the 60-day emergency purchase procedure had elicited only 89 million Mcf in a comparable period a year earlier.

severe as they have been in the past. In order effectively to minimize the deficiencies, and thereby to ameliorate the resulting economic and social disruptions, the Commission needs to know what tools it may legitimately employ to attract otherwise unavailable supplies to the interstate market during the critical high demand periods. Under the decision of the court of appeals, the Commission would be deprived of one such important tool which has proved to be effective. The statutory issue presented here warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-2009

CONSUMER FEDERATION OF AMERICA
AMERICAN PUBLIC GAS ASSOCIATION
AMERICAN PUBLIC POWER ASSOCIATION
NATIONAL LEAGUE OF CITIES—UNITED STATES CONFERENCE OF MAYORS, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

THE PUBLIC SERVICE COMMISSION FOR THE STATE OF NEW YORK
ASSOCIATED GAS DISTRIBUTORS
TEXAS GAS TRANSMISSION CORPORATION &
TRANSCONTINENTAL GAS PIPELINE CORPORATION,
INTERVENORS

Petition for Review of an Order of the Federal Power Commission

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Decided March 13, 1975

* * * *

Before: DANAHER, *Senior Circuit Judge*, LEVENTHAL and WILKEY, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* LEVENTHAL.

LEVENTHAL, *Circuit Judge*: Petitioners seek review of 1973 Federal Power Commission orders, Order 491 and its supplements, which were based on projected gas shortages during the 1973-74 winter heating season. The challenged orders, for convenience referred to collectively as Order 491, exempted from the certification requirement of section 7 of the Natural Gas Act sales of 180 days duration made to pipelines experiencing or facing threatened curtailment of service. Under the 180 day exemption, producers were permitted to enter into contracts with eligible pipelines at any price and without risk of subsequent refund orders.[1] The FPC proposed to protect the consumer by allowing pipelines to pass on only those purchased gas costs "shown to have been required by the public interest." [2]

Petitioners contend that the 180 day exemption constitutes an impermissible deregulation of producer sales in violation of the "just and reasonable" rate requirement of §§ 4 and 5 of the Act and the requirement of § 7 that new sales and service are permitted only under a certificate that they further the public convenience and necessity.[3] The Commission responds that its order are a proper exercise of its power under § 7(c) to exempt "temporary

[1] *See* Order No. 491-B, November 2, 1973, at 14.

[2] *Id.* at 13.

[3] *See* Brief for Petitioners at 28.

acts or operations" from the § 7 certification requirement.[4] We conclude that the Commission has stretched unduly its narrow § 7 exemption authority and has failed to establish a valid scheme of indirect regulation. Accordingly, we set aside the challenged orders. For the reasons set forth in part IV of the opinion, we remit petitioners' refund request for FPC consideration in the first instance.

I. BACKGROUND

An FPC staff survey revealed in 1970 that adequate gas supplies might not be available for the 1970-71 winter heating season.[5] In response to the anticipated shortfall, the Commission adopted Order 402, May 6, 1970, authorizing intrastate distribution companies to make 60 day resales of gas to jurisdictional pipelines without FPC approval or risk of becoming a "natural gas company" subject to Commission regulation.[6] Subsequently, the Commission issued Order 418 which modified regulations to permit 60 day purchases from independent producers "where an emergency exists on the pipeline's system." [7] The FPC noted in April, 1971, that despite

[4] *See* Brief for Respondent at 23.

[5] *See* Order 431, 45 FPC 570, 571 (1971).

[6] 43 FPC 707 (1970) (Adding new section 2.68 to the FPC's Statement of General Policy and Interpretations under the Natural Gas Act).

[7] 44 FPC 1574 (1970) (amending 18 C.F.R. §§ 157.22 and 157.29).

"these emergency measures" a number of pipelines were unable to meet their firm demands.[8] In order to forestall emergencies during the next winter the Commission in Order 431 extended the 60 day exemption and decided to "consider limited-term certificates with pre-grant abandonment, if the pipeline demonstrates emergency need."[9] None of these early measures were challenged in the courts.[10]

Another staff study of gas supplies, released July 16, 1973, projected "net curtailments of firm requirement customers of the major interstate pipelines" of 1.2 trillion cubic feet (tcf) during the April, 1973, to March, 1974, period with a .5 tcf shortfall during the 1973-74 winter.[11] The study found "reliable and adequate gas service even more jeopardized than at the juncture when [the Commission] initiated emergency measures" in 1970.[12] Concluding that further steps were necessary to prevent "severe economic and environmental consequences," the Commission, without notice or opportunity for comment, issued Order 491 on September 14, 1973.[13] The order exempted from § 7's certification requirement emergency sales, if deliveries commenced before March 15, 1974, even though they ran

[8] *See* Order 431, 45 FPC 570, 571 (1971).

[9] *Id.* at 572.

[10] *See* Order 491-A, 50 FPC 848, 853 (1973).

[11] *See* Order 491, 50 FPC 742, 743 (1973).

[12] *Id.*

[13] *See id.* at 742-743.

for a period as long as 180 days. Order 491 also suspended the limited-term certificate procedure of Order 431 "pending further study and order of the Commission."[14]

On September 20, petitioners—Consumer Federation of America, American Public Gas Association and National League of Cities-United States Conference of Mayors[15]—sought leave to intervene and moved for rehearing and a stay of Order 491. Next day they filed a motion for stay in this court, claiming that the Commission's order had been adopted in violation of the Administrative Procedure Act and the Natural Gas Act.[16] The FPC denied petitioners' stay application in Order 491-A, Septem-

[14] *See id.* at 744-45.

[15] Briefs in this case have also been filed by Intervenors Texas Gas Transmission Corp. and Transcontinental Gas Pipe Line Corp. (Pipeline Intervenors), Intervenor Associated Gas Distributors, and a group of Senators and Representatives acting as *amicus curiae*.

Amicus curiae, like petitioners, urges us to set aside Order 491. The intervenors address only portions of the order under review. The Pipeline Intervenors support the 180 exemption but claim that the Commission lacks the authority to prevent pipelines from passing on to consumers "purchased gas expenses resulting from contracts entered into as "arm's length' and in good faith." Brief for Pipeline Intervenors at 3. Intervenor Associated Gas Distributors defends only the 180 day exemption of emergency sales, exchanges and deliveries between distribution companies exempt from FPC regulation and interstate pipelines or distribution companies in other states. *See* note 86 *infra*.

[16] *See* Motion for Stay at 1, Sept. 21, 1973; Brief for Petitioner at 11.

ber 25, 1973.[17] This order presented a more detailed picture of the projected curtailments and explained that the 180 day period was necessary "to obtain sufficient commitments for this winter heating season." [18] In addition, the Commission announced that it would allow interested parties to file comments. This court heard oral argument on petitioners' motion and, on October 3, 1973, stayed Order 491 pending Commission reconsideration after receipt of comments.[19]

The FPC's Order on Reconsideration, Order 491-B, November 2, 1973, reaffirmed its decision to expand the emergency sales exemption to 180 days and reinstituted the limited-term certificate procedure. Petitioners applied to the FPC for a rehearing and stay of Order 491-B and moved in this court for an extension of the October 3 stay pending resolution of their petition for review. The Commission denied the rehearing and stay requests in Order 491-C, November 21, 1973. We then granted a stay of Order 491-B pending judicial review. Ten days later, on December 20, 1973, the Supreme Court granted the Solicitor General's application to vacate our stay.

Live Controversy

Although all sales under Order 491 have been completed, the present controversy remains alive. Fol-

[17] 50 FPC 848 (1973).

[18] *See id.* at 852.

[19] Brief for Petitioners at 12.

lowing the Supreme Court's action, the Order 491 procedures were available for sales to pipelines facing curtailment until terminated by Order 491-D on March 15, 1974. Between September 1973 and September 1974 over 500 sales, involving more than 172 billion cubic feet (172,000,000 mcf) of natural gas were exempted under the challenged orders.[20] Petitioners not only request that we set aside the expired orders but also seek refunds of rates paid producers in excess of the just and reasonable rate.[21] The limited duration of the orders combined with the continuing gas shortage make this controversy one "capable of repetition, yet evading review." [22] Indeed, while this case was pending the Commission advised that it was considering reinstating the 180 day exemption for the 1974-75 season.[23]

II. Scope of the Section 7(c) Proviso

Section 7 of the Natural Gas Act [24] requires that a natural gas company obtain a certificate of public

[20] *See* Order Directing Solicitor to seek an Expedited Decision in the Appeal of Orders No. 491, *et seq.*, at 6, Jan. 16, 1975.

[21] Brief for Petitioners at 13.

[22] *See* Roe v. Wade, 410 U.S. 113, 125 (1973), *quoting* Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

[23] *See* Motion for Expedited Decision at 3-4, Jan. 17, 1975.

[24] Section 7 of the Natural Gas Act, 15 U.S.C. § 717f (1970), provides in pertinent part:

> (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed

construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice

convenience and necessity prior to engaging in the transportation or sale of natural gas in interstate commerce. Application for a certificate "shall be denied" unless the Commission after notice and hearing finds that the proposed sale or service "is or will be required by the present or future public convenience and necessity."[25] The FPC premised its decision "to exempt emergency purchases from regulation for 180 days" on a proviso in § 7(c) containing an exception to the general certification requirement.[26] The proviso states:

thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulation of the Commission thereunder, and that the proposed service sale, operation, construction, extention, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

[25] Section 7(e) of the Natural Gas Act, 15 U.S.C. § 717f(e) (1970).

[26] *See* Order 491-B, *supra* note 1, at 10.

> *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

The Commission puts it that "there is nothing in the legislative history . . . which is helpful to the interpretation of the Commission's exemption authority," and that "the clear language of Section 7 (c) and the overall purposes of the Act" supports its reliance on the proviso.[27] Our analysis of the legislative history and statutory framework leads to a contrary conclusion.

A. *Legislative History*

In our view, the legislative history lends considerable insight into the intended scope of the proviso. It was designed as a narrow exception to enable the companies and the Commission to grapple with temporary emergencies and minor acts or operations, like emergency interconnections to cope with breakdowns or sporatic excess demand for gas.

The proviso was adopted as part of an amendment to § 7 passed in 1942.[28] An amendment was

[27] Brief for Respondent at 16-17.

[28] 56 Stat. 83 (1942).

sought to remedy deficiencies in § 7(c) as enacted in 1938.[29] The 1938 law required certificates of public convenience and necessity only when natural gas companies proposed to enter "a market in which natural gas is already being served by another natural-gas company." [30] That provision, the FPC concluded, "has proved unsatisfactory and ineffective to protect the public interest." [31] The House Report proposing to drop the original limitation noted that it would fill

[29] *See* H.R. REP. No. 1290, 77th Cong., 1st Sess. 1-2 (1941). The Supreme Court has noted that the 1942 amendment "broadened" the protection provided consumers by adding the § 7 certificate requirement to its "rate-making regulatory tools." *See* FPC v. Hunt, 376 U.S. 515, 525-26 (1964); FPC v. Hope Natural Gas Co., 320 U.S. 591, 611-12 (1944).

[30] *See* 52 Stat. 825 (1938). This limiting language reflected Congress's concentration on the prevention of economic waste involved in duplication of service. *See* Letter, note 31 *infra*, at 81.

[31] Letter from Leland Olds, Chairman, Federal Power Commission, to Clarence F. Lea, Chairman, Committee on Interstate and Foreign Commerce, Aug. 2, 1941, *reprinted in Hearings on Natural Gas Act Amendments Before the House Comm. on Interstate and Foreign Commerce*, 77th Cong., 1st Sess., at 81 (1941).

The deficiencies were twofold—(1) The FPC had to shoulder "long and tedious proceedings to determine" the relevant market, and whether there was existing service, "before the merits of the case [could be] considered." *Hearings, supra,* at 3 (statement of FPC Commissioner Basil Manly). *See* H.R. REP. No. 1290, *supra* note 29, at 2; Letter, *supra,* at 81. (2) for areas not previously serviced by a natural gas company, the provision allowed "unregulated competition in extensions and even economic waste in construction of new interstate gas pipe lines." H.R. REP. No. 1290, *supra* note 29, at 2. Letter, *supra,* at 81-82.

the regulatory gap by "giving the Commission an oportunity to scrutinize the financial set-up, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services, and the characteristics of the rate structure in connection with the proposed construction or extension at a time when such vital matters can readily be modified as the public interest may demand." [32]

The proviso now relied upon by the FPC was not in the initial draft of the 1942 proposal (H.R. 4819),[33] but surfaced later as one of the two modifications prompted by gas company suggestions. In the House hearings, FPC Commissioner Manly referred to these modifications as "two slight amendments." [34] The only other reference to the proviso, in a letter of FPC Chairman Olds responding to a Committee request for an analysis of the bill, stated that the "language . . . was put in the bill primarily to provide for emergency interconnections of pipe lines, which are sometimes necessary to make it possible to maintain adequate service in cases of extraordinary peak demands, break-downs, and so forth." [35]

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[32] *See* H.R. REP. NO. 1290, *supra* note 29, at 2-3.

[33] The only exception in H.R. 4819 was a grandfather clause granting a certificate upon application to all natural gas companies engaged in transportation or sale on the date of the amendment. *See* § 7(c), 15 U.S.C. § 717f(c) (1970).

[34] *See Hearings, supra* note 31, at 18.

[35] *See Letter, supra* note 31, at 82.

Other discussion focused on the temporary certificate clause of the one-sentence proviso. That clause initially read: "[T]he Commission may issue a temporary certificate in cases of emergency, without notice and hearing, pending the determination of an application for a certificate." [36] During consideration of the bill, the clause was amended by adding after "emergency", "to assure maintenance of adequate service or to serve particular customers." [37] Both the FPC Chairman and the final House Report explained that the change was made "to limit the authority for granting a temporary certificate to emergency situations involving only a comparatively minor extension of the facilities of an existing system." [38] Relying on this history, we have held that the temporary certificate provision was intended to reach only "a narrow class of situations" involving interconnection or expansion of facilities to respond to "breakdowns in the service of operating natural gas companies, or sudden unanticipated demands." [39]

The FPC urges that we must disregard the legislative history and judicial interpretations of the temporary certificate clause because the Commission en-

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[36] *See* H.R. 5249, *reprinted in Hearings, supra* note 31, at 1.

[37] *See* H.R. REP. NO. 1290, *supra* note 29, at 1, 5.

[38] *See id.* at 5; Letter, *supra* note 31, at 83-84.

[39] Pennsylvania Gas and Water Co. v. FPC, 138 U.S.App. D.C. 298, 304, 427 F.2d 568, 574 (1970). *Compare* Algonquin Gas Transmission Co. v. FPC, 201 F.2d 334, 339-41 (1st Cir. 1953).

acted Order 491 under the exemption clause.[40] This we cannot do, for logic and history make it clear that the two clauses are intertwined. They have been joined since birth in a one-sentence proviso, both part of a single "slight amendment" to a bill that was overall an extension of the certification requirement to "all cases as a condition precedent to engaging in transportation or sale of natural gas subject to the jurisdiction of the Commission." [41]

We see no sound basis for concluding that the FPC has distinctly greater scope or authority to withdraw from the certificate requirement by invoking the exemption clause rather than the temporary certificate clause of this one-sentence proviso.[42] If anything, the purpose, text and history of the proviso run the other way. The primary purpose of Congress was to emphasize the public interest in permanent certification hearings as a condition for new gas operations. With the temporary certificate clause

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[40] Brief for Respondent at 16-17.

[41] *See* H.R. REP. No. 1290, *supra* note 29, at 2.

[42] That the exemption clause should not be broadened beyond the temporary certificate clause is underscored by the consideration that with an exemption clause the FPC removes the possibility, available in the case of a temporary certificate, of inserting a salvaging condition in the permanent certificate "as the public convenience and necessity may require." Section 7(e) of the Act; 15 U.S.C. § 717f(e) (1970). Even where an unconditional temporary certificate has been granted, the FPC may protect the public by ordering producers to refund amounts collected in excess of the permanent certificate rate approved after notice and hearing. *See* FPC v. Sunray DX Oil Co., 391 U.S. 9, 45 (1968).

the Commission merely provides interim operating authority pending the completion of the hearings. That temporary authority is not without significance, for it provides a "momentum which tends to perpetuate the temporary into the permanent." [43] Still, it does not scrap the hearings. In contrast, the exemption clause, when used, dispenses with certification hearings entirely. It was inserted for minor "temporary acts and operations" for which a hearing would be superfluous.[44] The exemption clause is not a broad blade to cut a wide swath out of the basic landscape of certification after due hearings. What it permits is a more modest kind of pruning, like the temporary certificate available for emergency trimming pending hearings.[45]

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[43] *See* Pennsylvania Gas and Water Co. v. FPC, 138 U.S. App.D.C. 298, 304, 427 F.2d 568, 574 (1970). The court went on to note that, although there is "latitude for agencies to expedite hearings in the public interest," "only a narrow class of real 'emergency' cases justifies the taking of action such as temporary certificates on an informal examination of the file without opportunity for hearing." *Id.* at 306, 427 F.2d at 576.

[44] As the Supreme Court noted in FPC v. Hunt, 376 U.S. 515, 520 (1964), the provision for temporary certificates in certain cases reflected Congress' understanding of the time consuming nature of permanent certification hearings. *See* Pennsylvania Gas and Water Co. v. FPC, 138 U.S.App.D.C. 298, 304, 427 F.2d 568, 574 (1970).

[45] The limited role of a disposition without any hearing is underscored by the fact that the requirement of a hearing is not a requirement of futile or obstructive hearings. The courts have made it plain that even when proceedings are of such a type that hearings are required generally, they are not required in particular cases or for particular issues where

In this case, we are reviewing an order expressly intended to elicit large volume sales.[46] The exemption it provided extended to all producers, and authorized sales of unlimited quantities of gas for a period that is not merely half the calendar year but spans an entire heating season. At a time when curtailment and shortages are projected for the foreseeable future, the Commission's 1973-74 position is tantamount to a claim of authority to continue this vast 180 day exemption indefinitely. It may be that an exemption should be authorized by the legislature, or that even without modification the Commission may have authority to institute a program upon due determination, after § 7 hearings of a need for certification in the public interest. Those questions are not

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there are no substantial issues of fact, and that even where oral hearings are required they may be conducted with foreshortened procedure, especially situations that call for expedition, so as to focus on the main points that merit oral ventilation. Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973); Marine Space Enclosures, Inc. v. FMC, 137 U.S.App.D.C. 9, 420 F.2d 577 (1969); Citizens for Allegan County, Inc. v. FPC, 134 U.S.AppD.C. 229, 414 F.2d 1125 (1969).

[46] Under the Order 491 procedure over 500 sales involving more than 172,000,000 mcf of gas were exempted from the certification requirement. Data on sales during the first 12 working days under the 180 day exemption reveal that the average price of 54.4¢ per mcf. SEE COMPTROLLER GENERAL sold at as much as 60¢ per mcf. Reports spanning a larger portion of the Order 491 sales showed an actual weighted average price of 54.4¢ per mcf. SEE COMPTROLLER GENERAL OF THE UNITED STATES, NEED FOR IMPROVING THE REGULATION OF THE NATURAL GAS INDUSTRY AND MANAGEMENT OF INTERNAL OPERATIONS 16-17 (1974).

before us. What we can say, and do say, is that the legislative history makes plain that it was never contemplated that the modest emergency proviso in § 7 for orders without hearings would be employed to excise large-volume, long-duration, widespread deliveries of gas.

B. *Purpose of the Section 7 Certificate Requirement*

Our divergence from the FPC's analysis pertains not only to legislative history, which FPC finds barren and we find meaningful, but also to purpose. In our view, the FPC's interpretation is undercut, rather than underscored, when consideration is given to the purpose of § 7 and its relationship to the overarching goals of the Act. The prior decisions discussing § 7 support our view.[47]

The original Act expressly declared in § 7(c) that it was "the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of ade-

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[47] *See, e.g.*, FPC v. Sunray DX Oil Co., 391 U.S. 9, 16-20, 36-37 (1968); FPC v. Hunt, 376 U.S. 515, 519-527 (1964); Atlantic Refining Co. v. Public Service Comm'n, 360 U.S. 378, 388-92 (1959); Continental Oil Co. v. FPC, 378 F.2d 510, 517-18 (5th Cir. 1967), *cert. denied*, 391 U.S. 918 (1968); Public Service Comm'n v. FPC, 117 U.S.App.D.C. 287, 290-92, 294, 329 F.2d 242, 245-247, 249, *cert. denied*, 377 U.S. 963 (1964); *See also* FPC v. Texaco, Inc., 417 U.S. 380, 386-87, 394 (1974).

quate service in the public interest." [48] The 1942 amendments to § 7 "were not intended to change this declaration of purpose," [49] but to remove impediments to its realization.

The Supreme Court's 1959 opinion in *Atlantic Refining Co.* v. *Public Service Comm'n* (CATCO)[50] contains the most comprehensive explication of how the statutory sections interrelate to protect purchasers of natural gas from excessive rates.[51] It found that "the initial certificating of a proposal under § 7(e)" was "crucial" to the functioning of the Act, given § 5's marginal value in redressing initial certified rates stemming from its "interminable" delays and only prospective impact.[52] The Court concluded that § 7 imposed a duty upon the Commission to engage

[48] 52 Stat. 825 (1938), *quoted in Atlantic Refining Co., supra* note 47, at 388.

[49] *Atlantic Refining Co., supra* note 47, at 388 n.7.

[50] 360 U.S. 378 (1959).

[51] *See id.* at 388, 389-91. The Court found § 7's certification requirement in the front line of protection against excessive initial rates. The Commission's authority to institute hearings under § 5, 15 U.S.C. § 717d (1970), to review all rates and set the just and reasonable rate "to be thereafter observed" functions as a limited check on excessive initial rates which might survive testing in a § 7 proceeding. *See* 360 U.S. at 389-90. Section 4 protects against unreasonable increases in rates (by empowering the Commission to suspend a proposed rate increase, for five months, and thereafter require a refund of amounts collected in excess of the just and reasonable rate) 15 U.S.C. 717c (1970), *see* 360 U.S. at 389, but it provides no protection against excessive initial rates.

[52] 360 U.S. at 389.

in "a most careful scrutiny and responsible reaction to initial price proposals of producers." That scrutiny demands attentiveness to the evidence presented by the producer with "price a consideration of prime importance" in the application of the public convenience and necessity standard.[53]

It is the clear teaching of *CATCO* and its progeny that preservation of the statutory scheme depends on diligent enforcement of the § 7 certification requirement as a holding operation on initial rates. Any interpretation of the § 7(c) proviso that would empower the FPC to exempt the sale of large quantities of gas from the certification process would be antithetical to this basic purpose of the statutory framework.

The FPC's brief argues that *CATCO* only requires a close scrutiny of rates for sales that require a certificate.[54] What it fails to appreciate is that § 7 must be given a broad reading, and the exemption a narrow construction, in light of the overall purpose of § 7 to provide a scrutiny needed in the public interest. As the FPC brief notes, (pp. 18-20), § 7's public convenience and necessity standard does not require a finding that proposed rates are just and reasonable as a precondition to certification.[55] However, the fact that § 7 does not give a complete "bond of protection" against initial rates in excess of a

[53] *Id.* at 391.

[54] Brief for Respondent at 17, 21.

[55] *See Atlantic Refining Co., supra* note 47, at 390-91.

"just and reasonable" level, is no basis for stretching the exemption proviso to sweep aside the critical safeguards that are embodied in its certification process.[56]

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[56] Although § 4(a) requires that "[a]ll rates and charges . . . received by any natural-gas company . . . shall be just and reasonable," neither the Commission nor the courts have required that initial rates meet that standard as a condition to certification under § 7. The Supreme Court explained that the delay inherent in determining just and reasonable rates made such a requirement inappropriate for regulation of initial rate under § 7. *See* United Gas Improvement Co. v. Callery Properties, Inc., 382 U.S. 223, 227-28 (1965). Nor have refunds been required where permanent certificate rates have been found to exceed the just and reasonable rate. Although this result deviates from the "logic" of the Act's "complete, permanent and effective bond of protection," it normally serves "to speed refunds to consumers and to assure producers of a firm price." FPC v. Sunray DX Oil Co., 391 U.S. 9, 36-37 (1968).

The absence of complete symmetry in the interworking of §§ 4, 5, and 7 does not minimize the importance of the protection afforded by the certification requirements. Following *CATCO*, the FPC adopted a practice of certifying initial sales at the price approved in "contemporaneous certificates no longer subject to judicial review or in any way 'suspect.'" United Gas Improvement Co., *supra*, at 227; *See* Public Service Comm'n v. FPC, *supra* note 47, at 290-92, 329 F.2d at 245-47. This procedure provided considerable safeguards pending completion of area proceedings to establish just and reasonable rates. Consumer views as to the appropriate in-line rates could be aired in certification proceedings and judicial review was available to set aside arbitrary in-line prices. In addition, consumers could seek refunds of amounts collected under temporary certificates in excess of the in-line rate. *See* note 42 *supra*.

The Commission's reliance on the distinction between the § 4 and § 7 standards overlooks the significant protections contained in each provision. The deviations from just and reasonable rates that are tolerated to accommodate the need

III. Order 491 as a Means of Indirect Regulation

To avoid the charge that a § 7(c) exemption would ignore impact of the exempted sales on price levels and hence constitute impermissible deregulation,[57] the FPC relies on the provision in Order 491-B prohibiting pipelines from passing on to consumers purchased gas costs from contracts "improvidently consummated at a rate which was more than necessary to secure the gas for the interstate market."[58] The court is not clear what this FPC analysis protends, whether it is local color to induce an expansive reading of the § 7(c) exemption, or a larger contention of inherent authority in the absence of impact on the consumers, a claim, or rather a disclaimer, that any error was not "prejudicial." In any event, this broadside justification for the exemption program must fail, for the reasons stated recently by the Supreme Court in *FPC* v. *Texaco*.[59]

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for prompt certification determinations may not be acceptable when the Commission dispenses with certification of initial sales. *See* FPC v. Texaco, Inc., 417 U.S. 380 (1974) (requiring that all producer rates be just and reasonable under a scheme or indirect regulation).

[57] *See* Brief for Respondent at 27-28.

[58] Order 491-B, *supra* note 1, at 14.

[59] 417 U.S. 380 (1974). *Texaco* involved Order 428 which granted a blanket certificate to all small producers exempting their existing and future sales from direct rate regulation. The Commission proposed to regulate small producer sales indirectly by allowing large producers and pipelines to pass

Texaco found that "the rates of all gas producers" must conform to the just and reasonable requirement of §§ 4 and 5. It disposed of the FPC's contention that its exemption of small producers from direct control was valid because it was part of an overall program that was tantamount to "indirect regulation" of such producers. The Court concluded that indirect regulation would be valid, "providing that it [the Commission] insures that the rates paid by pipelines, and ultimately borne by the consumer, are just and reasonable." [60] In the present case, the Commission made no attempt to evaluate the reasonableness of the projected rates which would be "paid by pipelines" to producers under the 180 day exemption. Even if the producers charged the interstate pipelines no more than they charged other bidders in the unregulated intrastate market, *Texaco* took occasion to "stress that in our view the prevailing price in the marketplace cannot be the final measure of 'just

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on only costs that were not "unreasonably high considering appropriate comparisons with highest contract prices for sales by large producers or the prevailing market price for intrastate sales in the same producing area." Order 428, 45 FPC 454, 457 (1971). The Court found that "the Commission is free to engage in indirect regulation of small producers by reviewing pipeline costs of purchased gas, providing that it insures that rates paid by pipelines, and ultimately borne by the consumer, are just and reasonable." 417 U.S. at 401. But it concluded that Order 428 could not "stand in its present form" because of its failure to state clearly that producers would be allowed to receive and pipelines would be authorized to collect only just and reasonable gas rates. *Id.* at 395-97.

[60] *Id.* at 387, 401.

and reasonable' rates mandated by the Act." [61] And there is nothing in Order 491 which prohibits the interstate pipeline from offering more, to coax the producer to sell in the interstate market. Indeed, the Commission expressly assured producers that they could keep, without risk of refund, any price they could obtain from the beleaguered pipelines.

Throughout the years in controversies such as *Phillips* [62] and *CATCO*, the FPC has sought to justify inaction at the level of producer rates on the ground that the pressures built up by producer rate increases could somehow be contained at the pipeline level by invoking a regulatory agency's authority to disallow "excessive" costs. And throughout the years, the Court has found this professed substitute inadequate. Both Order 491-B and the Commission's brief speak only of its statutory duty to protect consumers from exploitation by the natural gas companies.[63] The Commission's bypassing of its statutory duty as to producer rates, to insure that the rates paid to producers were just and reasonable, renders Order 491 vulnerable under *Texaco*.[64]

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[61] 417 U.S. at 397.

[62] Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954).

[63] *See* Order 491-B, *supra* note 1, at 13-14, Brief for Respondent at 25.

[64] The Commission attempts to distinguish *Texaco* as involving a permanent exemption of all small producer rates from direct regulation. We do not find this factual difference determinative. First, the comparatively small quantities of gas involved do not excuse deviation from the just and

Turning our focus to the rates "ultimately borne by the consumer," we note that Order 491 does "not expressly mention the just-and-reasonable standard." [65] Order 491-A merely stated that the "rate at which these emergency volumes are committed to interstate pipelines will be examined in our pipeline regulatory review under §§ 4 and 5 of the Act, in the same manner as purchases are reviewed under prior emergency procedures." [66] Order 491-B added that pipelines will be permitted to pass on purchased gas costs "*only* when such rates can be shown to have been required by the public interest." [67] The FPC amplified its intention by noting that costs from purchases "improvidently consummated at a rate which was more than necessary to secure the gas for the interstate market" could not be fully recouped from consumers.[68] The Commission's brief seeks to add a gloss that "any unreasonably high prices" or

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reasonable standard for not even "a little unlawfulness is permitted." 417 U.S. at 399. Second, *Texaco* makes no exception to the just and reasonable requirement for initial sales even though such new small producer sales were included within the scope of Order 428. The Court's failure expressly to address the question to initial sales leaves open the possibility that they could be tested against comparable "in-line" rates rather than the just and reasonable rate. *But see* note 56 *supra*. In either case, the Commission failed to insure proper producer rates through its scheme of indirect regulation.

[65] 417 U.S. at 396, 401.

[66] 50 FPC at 852.

[67] Order 491-B, *supra* note 1, at 13 (emphasis into original).

[68] *See id.* at 14.

any costs that "appear to have been unreasonably incurred" may not be passed on to consumers.[69]

As in *Texaco*, the FPC's order does not set forth its standard of indirect regulation with "requisite clarity" to provide assurance that the rates "ultimately borne by the consumer are just and reasonable." [70] The entire point of Order 491 is to free "pipelines facing emergencies" from price constraints to "enable them to secure substantial gas supplies which might otherwise be lost to the intrastate market or interstate pipelines not facing an emergency." [71] The tenor of the order suggests that the public interest will be served by matching or outbidding intrastate customers (from whom the producers may obtain unreasonably high rates, so far as Federal law is concerned), and that such necessary expenditures for scarce gas supplies may be recouped from consumers. We believe that *Texaco* precludes the FPC from using a scheme as open-ended as this one as equivalent to a meaningful technique of indirect regulation.[72]

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[69] Brief for Respondent at 13, 26.

[70] *See* 417 U.S. at 397, 401.

[71] *See* Order 491-B, *supra* note 1, at 7.

[72] A further problem is presented by the possibility that 491 sales will escape indirect regulation as a result of purchased gas adjustment clauses in existing pipeline rate tariffs. Under those clauses pipelines may be able to pass on their increased gas expenses from Order 491 purchases without filing a rate increase under § 4. *See* Order 452, 47 FPC 1049 (1972). The Commission has failed to explain how it can protect consumers

A related shortcoming is the Commission's failure to provide pipelines with standards to guide them in latitude contemplated in contracting for emergency purchases. Under Order 491, if pipelines pay too much for gas supplies, they may incur expenses that are nonrefundable." [73] In *Texaco* the Court was concerned with the squeeze on the pipelines which stemmed from making payments that would be both disallowed and nonrefundable, and made it clear that any such program would require "guidance" for those that might be affected.[74] The warning in Order 491 against "improvident" contracts does not provide adequate guidance to protect the pipelines. The Commission attempts to avoid this problem by stating that the procedures are "purely optional" and that the order does not "coerce a pipeline into making such purchases." But a commission seeking to defend an exemption order cannot in this way ignore its responsibility to give guidance to pipelines that accept the Commission's open-door invitation to obtain needed supplies through Order 491 purchases.[75]

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against rate increases in the absence of an amendment to the purchased gas clause regulation, 18 C.F.R. § 154.38(d)(4) (1974), or a § 4 filing. *See* Brief for Petitioner at 26.

[73] *See* Order 491-B, *supra* note 1, at 14.

[74] *See* 417 U.S. at 393.

[75] *See* Brief for Respondent at 27; Brief for Pipeline Intervenors at 15-16.

IV. The Refund Issue

Our prior decision to stay Order 491-B pending appeal rested on a concern that refunds might not be available as a means of remedying any resulting injury. In applying to the Supreme Court to vacate the stay, the Solicitor General represented that should the order be set aside on review the Commission "would have full authority to require refunds of any [excessive] rates collected by a natural gas company." [76] The Supreme Court granted the application on December 20, 1973, and purchases under the order were allowed to proceed pending review in this court.

Petitioners now urge us to order refunds in addition to setting aside Order 491. But not every decision invalidating an agency order is given full retroactive effect.[77] We express no opinion on the refund issue, beyond saying that, in our view, it involves complex and difficult questions which must be presented to and addressed by the Commission in the first instance. In matters of prospective and retroactive effect, there are large questions of equity and public interest—both for agencies [78] and for courts.[79]

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[76] *See* Application to Vacate Stay entered by the United States Court of Appeals for the District of Columbia Circuit, Dec. 1973, at 9-10 n.7 (relying on United Gas Improvement Co. v. Callery Properties, Inc., 382 U.S. 223, 229 (1965)).

[77] Zuber v. Allen, 396 U.S. 168 (1969); Blair v. Freeman, 125 U.S.App.D.C. 207, 370 F.2d 229 (1966).

[78] *See* Niagara Mohawk Power Corp. v. FPC, 126 U.S.App. D.C. 376, 379 F.2d 153 (1967).

[79] *See* cases cited note 77 *supra*.

While full refund under an invalid order is a sound basic rule, it may be offset, at least in part, by the lack of a mechanism to restore the full status quo ante, the fact that consumers may have had the benefit of some increase in supply that would not have been forthcoming under § 7 procedures, albeit purchased at an excessive price, and the fact that some portion of the increased prices paid may be discerned as consistent with just and reasonable producer rates.

The FPC will have to consider the effect of its representation to the Supreme Court and its prior assurance to producers that no refunds would be required under the order.[80] Whether and how to exercise an authority to order refunds requires the development of factual matters not presently in the record as well as a broad and penetrating analysis of "the factors pro and con a refund, and its amount or extent, in arriving at an equitable conclusion." [81]

V. Conclusion

As a reviewing court, we must grant the Commission broad latitude in devising methods of regulation "in this time of acute energy shortage." [82] But, although we are receptive to "novel" approaches, we

[80] *Cf.* FPC v. Sunray DX Oil Co., 391 U.S. 9, 46 (1968).

[81] *See* Public Service Comm'n v. FPC, 117 U.S.App.D.C. 287, 295, 329 F.2d 242, 250, *cert. denied*, 377 U.S. 963 (1964).

[82] *See, e.g.*, Mobil Oil Corp. v. FPC, 417 U.S. 283, 331 (1974); Public Service Comm'n v. FPC, No. 73-1338, slip op. at 32 (D.C. Cir., Jan. 14, 1975).

cannot neglect our duty to "assure fidelity to the functions assigned to the regulatory agencies by Congress." [83] Our examination of Order 491 convinces us that the Commission has exceeded its authority under the Act. In essence, it has attempted to remedy the shortfall of supply in the interstate market by authorizing a supplemental injection of large quantities of gas through sales freed from the constraints of meaningful regulation. We reject the FPC's claim that § 7(c) supports this substantial, partial deregulation, and find that the Commission has neglected its rate control responsibilities under the Act. Congress has yet to embrace proposals for deregulation of new gas supplies.[84] Until it acts to alter the present "system of regulation by an agency subject to court review, the courts may not abandon their responsibility by acquiescing in a charade or a rubber stamping of nonregulation in agency trappings." [85]

[83] *See* Texas Gulf Coast Area Rate Cases, 159 U.S.App.D.C. 172, 208, 487 F.2d 1043, 1079 (1973), *vacated and remanded sub nom.* Shell Oil Co. v. Public Service Comm'n, 417 U.S. 964 (1974).

[84] *See* FPC v. Texaco, Inc., 417 U.S. 380, 400-01 (1974). The natural gas deregulation bills introduced in the 93d Congress, S. 2048 and H.R. 7507, did not receive committee approval in either chamber despite President Ford's September 12, 1974, message to Congress placing priority on natural gas deregulation.

[85] Public Service Comm'n v. FPC, No. 73-1338, slip op. at 33 (D.C. Cir. Jan. 14, 1975).

Accordingly, the orders under review are set aside.[56]

So ordered.

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[56] Intervenor Associated Gas Distributors claims that we need not set aside the entire order if we find that the FPC has exceeded its authority in granting a 180 day exemption for sales by gas producers. While we recognize that sales and exchanges of gas by intrastate distribution companies may be distinguishable from the producer sales at the core of this dispute, the matter has not been subject to scrutiny by the Commission and the other parties or addressed at argument. In this posture, we cannot say that this minor strand of Order 491 should be severed and preserved. This question may properly be addressed by the courts if it is first presented to the FPC for focused consideration in light of this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-2009

September Term, 1974

[Filed Mar. 13, 1975, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

CONSUMER FEDERATION OF AMERICA
AMERICAN PUBLIC GAS ASSOCIATION
AMERICAN PUBLIC POWER ASSOCIATION
NATIONAL LEAGUE OF CITIES—UNITED STATES CONFERENCE OF MAYORS, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

THE PUBLIC SERVICE COMMISSION FOR THE STATE OF NEW YORK
ASSOCIATED GAS DISTRIBUTORS
TEXAS GAS TRANSMISSION CORPORATION &
TRANSCONTINENTAL GAS PIPELINE CORPORATION, INTERVENORS

PETITION FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

Before: DANAHER, Senior Circuit Judge, LEVENTHAL and WILKEY, Circuit Judges

JUDGMENT

This cause came on to be heard on a petition for review of orders of the Federal Power Commission and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the orders of the Federal Power Commission on review herein are set aside, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ Hugh E. Kline
Hugh E. Kline
Clerk

Date: March 13, 1975

Opinion for the Court filed by Circuit Judge Leventhal.

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. RM74-3

(18 CFR 157.22(d), 157.29, 2.68 and 2.70)

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., and William L. Springer.

Policy with Respect to Establishment of Measures to be Taken for the Protection of Reliable and Adequate Service for the 1973-1974 Winter Heating Season

ORDER NO. 491

STATEMENT OF POLICY AND ORDER AMENDING PRIOR POLICY STATEMENTS AND REGULATIONS UNDER THE NATURAL GAS ACT

(Issued September 14, 1973)

Effective upon the date of issuance of this order, the Commission issues herein a new policy statement, amends Sections 2.68 and 2.70 of its General Policy and Interpretations and Sections 157.22 and 157.29 of its Regulations under the Natural Gas Act.

Our authority to promulgate this policy statement and amend prior policy statements and regulations is contained in the Natural Gas Act, particularly Sections 7 and 16 therein, and the Administrative Pro-

cedure Act. No notice of these actions is required under the Administrative Procedure Act, nor do we find that notice and public procedure would either be practicable, necessary, or serve the public interest.[1] We have used such summary procedures in order that we may promulgate policies to assist some 43 million gas consumers to obtain adequate, safe and reliable service for the 1973-1974 winter heating season.[2] However, we will re-examine our actions herein, on or before March 15, 1973, the latter being the termination date unless otherwise ordered.[3]

In Commission Order Nos. 402 and 402-A,[4] the Commission promulgated a policy statement (2.68 of our General Policy and Interpretations), which encouraged persons and companies exempt under Sections 1(b) and 1(c) of the Act (distribution companies and intrastate pipelines) to make short-term sales or deliveries of natural gas in interstate commerce so as to make available temporary emergency

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[1] 5 U.S.C. 553(b)(3)(A) and (B). Cf. *Memphis Light, Gas and Water Division* v. *F.P.C.*, 462 F.2d 853 (D.C. Cir. 1972), reversed on other grounds, 411 U.S. 458 (1973).

[2] Cf. *F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972); *Alabama Gas Corp.* v. *F.P.C.*, 5th Cir., No. 72-1415, February 7, 1973; *P.S.C. of N.Y.* v. *F.P.C.*, 467 F.2d 361 (D.C. Cir. 1972). See also *Gulf States Utilities Co.* v. *F.P.C.*, S.Ct. No. 71-1178, May 14, 1973, slip op. at 14-15; *Mobil Oil Corp.* v. *F.P.C.*, 469 F.2d 130 (D.C. Cir. 1972), cert. denied, S.Ct. No. 72-1108, June 4, 1973.

[3] See *P.S.C. of N.Y.*, *supra*, rehearing order of May 19, 1972.

[4] 43 FPC 707 (1970), 43 FPC 822 (1970).

gas supplies, without our approval, for up to 60 days.

Under Order No. 418,[5] we amended Sections 157.22 and 157.29 of our Regulations under the Natural Gas Act, to provide for emergency sales by producers to interstate pipelines and for emergency operations (e.g. exchanges) between pipelines for up to 60 days, which transactions were exempted from prior Commission certificate authorization under Section 7 of the Act.

In conjunction with Order Nos. 402 and 418, the Commission issued Order No. 431,[6] promulgating 2.70 of our General Policy and Interpretations, indicating that "[n]otwithstanding these emergency measures [Order Nos. 402 and 418], a number of natural gas pipelines indicated their inability to deliver sufficient gas to meet their firm demands." By that order we continued the prior emergency measures, i.e. up to 60 days, but provided that we would consider limited-term certificates for purchases extending beyond that 60-day period, with pregranted abandonment, if the pipeline demonstrates emergency need and has (1) made every reasonable effort to fill all storage fields and (2) filed curtailment plans.[7] 2.70(b)(3)

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[5] 44 FPC 1574 (1970).

[6] 45 FPC 570 (1971).

[7] Such filings for limited-term certificates were made pursuant to Paragraph 12 in Docket No. R-389-A, July 17, 1970. 35 Fed. Reg. 11638.

Promulgation of the above-emergency measures has resulted in commitments of natural gas to interstate consumers of 1.2 trillion cubic feet, through purchases ranging for 60 days to three years, from 1971 through May of 1973.

In Order No. 418, we noted that:

> Several parties suggested that the proposed 60-day period of emergency operation be extended to periods ranging from three to six months. * * * We shall * * * defer disposition of this issue until such time as we may propose additional rules applicable to emergency transactions on a more extended basis. 44 FPC at 1575.

We now dispose of that reserved issue, at least on an interim basis.

On July 16, 1973, the Commission's staff released its most recent report on past curtailments and projected curtailments for the 1973-1974 winter heating season.[8] That report indicated (after eliminating intercompany transactions) that net curtailments of firm requirements customers of the major interstate pipelines represented about .8 trillion cubic feet from April 1972 to March 1973, and was reported to increase to about 1.2 trillion cubic feet during the April 1973-March 1974 period. Such curtailments for the 1973-1974 winter heating season are estimated to be .5 trillion cubic feet of natural gas; the equivalent of about 85 million barrels of oil. The report further

[8] We take official notice of FPC News Release No. 19441, July 16, 1973, publishing that report.

indicated acute regional curtailments, both this summer and for the current winter-heating season, in the New England, Appalachian, Great Lakes and Northern Plains regions. Such curtailments will result, as they did last year, in severe economic and environmental consequences, resulting in the closing of schools and factories, the denial of utility service to new customers, the utilization by industry and electric utilities of alternate fuels which impact upon ambient air quality standards, and the transfer of unfulfilled demand to other fuels in short supply with the resultant upward price pressures. At least for the 1973-1974 winter-heating season, reliable and adequate gas service is even more jeopardized than at the juncture when we initiated emergency measures, *supra*, over three and one-half years ago.

We further take notice of the overall domestic fuel situation for this 1973-1974 winter heating season. The unfulfilled demand for natural gas cannot be readily transferred to other fuels. Propane and fuel oils are in limited supply and neither can fulfill the projected firm requirements for customers of interstate pipelines.

In order that this Commission can discharge its responsibilities to the Nation's gas consumers and carry out our Congressionally-delegated mandate, we are effective this day amending Sections 2.68 and 2.70 of our General Policy and Interpretations and Sections 157.22 and 157.29 of our Regulations under the Natural Gas Act, to change the 60-day emergency measures provided therein, so as to change the

term to a maximum of 180 days under which no Commission authorization is required in advance.[9] Concurrently, we are providing that Section 2.70(b)(3), which provides for the filing of limited-term certificates under Paragraph 12, *supra*, is hereby stayed, pending further review and order of the Commission. All such limited-term certificate applications, which have been filed with the Secretary as of the date of issuance of this order, will be processed, as in the past, and any applications submitted after the date of this order, shall be returned, without prejudice to the applicant. Applicants are free to file notices of withdrawal of limited-term certificates previously filed, pursuant to Section 1.11(d) of our Rules and Regulations.

On or before March 15, 1974, the Commission will have reviewed the emergency measures provided herein. Transactions entered into prior to March 15, 1974, may continue for a period up to 180 days, i.e. an emergency measure initiated on February 1, 1974, may continue until July 31, 1974. Those 60-day emergency transactions which have commenced as of the date of issuance of this order may continue, depending upon the agreement between the parties,

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[9] Section 7(c) of the Act provides, in part, that we "may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required." 15 U.S.C. 717f(c) See Section 2.67a of the General Policy and Interpretations, concerning the finding of insufficient gas supplies and rate treatment of the investment tax credit. Order No. 448, 47 FPC 141 (1972).

for 180 days beginning at the time of termination of the 60-day transaction. In addition to the existing reporting requirements, we will require that the pipeline purchaser report to the Secretary within ten (10) days after deliveries commence under the 180-day procedure, the estimated volumes and rate charged for the emergency sale.

We will review these measures to determine their impact during the 1973-1974 winter-heating season and to determine what emergency measures may be required during the 1974 summer storage injection period and the 1974-1975 winter-heating season.

The Commission finds:

(1) The revisions to the policy statements and regulations herein do not require notice or hearing under 5 U.S.C. 553.

(2) Many interstate natural gas pipelines have been unable to obtain and are expected to have problems in obtaining, short-term emergency gas supplies to meet their firm requirements during the 1973-1974 winter-heating season, in the absence of the revised emergency measures herein promulgated.

The Commission orders that effective upon issuance:

(A) Part 2, Subchapter A, General Rules, Chapter I of Title 18 of the Code of Federal Regulations, is amended by revising the following:

§ 2.68(a) and (b)—The 60-day periods found therein are changed to 180 days.

§ 2.70(b)(3)—The 60-day periods found therein are changed to 180 days.

The following provision is stayed pending further order of the Commission:

If the emergency purchases are to extend beyond the 60-day period Paragraph 12 in the notice issued by the Commission on July 17, 1970, in Docket No. R-389-A should be utilized. The Commission will consider limited-term certificate with pregranted abandonment, if the pipeline demonstrates emergency need, after complying with subparagraph (1) and (2) of this paragraph.

(B) Section 157.22, Subchapter E, Chapter I, Title 18 of the Code of Federal Regulations, is amended by revising the following:

§ 157.22(a)—The sixty-day period is changed to 180 days.

(d)—The 60-day period is changed to 180 days.

(C) Section 159.29, Subchapter E, Chapter I, Title 18 of the Code of Federal Regulations, is amended by revising the following:

§ 157.29(a)—The sixty (60) day period is changed to 180 days.

(b)—The 60-day period is changed to 180 days.

(D) The revisions and amendments in (A), (B) and (C) are effective upon issuance and until March 15, 1974.

(E) The Commission provides that any interested person may file comments on the revisions effective herein, such filings to be made in written form with the Secretary of the Commission and to be filed during the period January 15, 1974 to February 15, 1974, for consideration by the Commission prior to its March 15, 1974 review.

By the Commission.

[SEAL]

Kenneth F. Plumb,
Secretary.

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., and William L. Springer.

Docket No. RM74-3

Policy with Respect to Establishment of Measures to be Taken for the Protection of Reliable and Adequate Service for the 1973-1974 Winter Heating System

ORDER NO. 491-A

ORDER MODIFYING PROCEDURES ON RECONSIDERATION AND DENYING MOTION FOR STAY

(Issued September 25, 1973)

On September 14, 1973, we issued Order No. 491 which amended Section 2.68 and 2.70 of our General Policy and Interpretations and Sections 157.22 and 157.29 of our Regulations under the Natural Gas Act so as to extend the term of the emergency measures prescribed therein from 60 days to 180 days, subject to our review on or before March 15, 1974. On September 20, 1973, applications for rehearing, petitions to intervene and motions for stay of Order No. 491 were filed by the Public Service Commission of the State of New York (New York) and the Con-

sumer Federation of America, the American Public Gas Association, the American Public Power Association and the National League of Cities—United States Conference of Mayors (Consumer Federation, *et al.*).

New York and Consumer Federation, *et al.* contend that the issuance of Order No. 491 was procedurally defective under the Administrative Procedure Act (APA), since no opportunity for public comment was provided. As we stated in Order No. 491, notice and public comment thereon are not required when the agency finds and states that such procedure would be "impracticable, unnecessary, or contrary to the public interest."[1] Petitioners argue that since notice was issued and comments received in our similar action in Order No. 418,[2] *a fortiorari* the same procedures are required here. However, the mere fact that we solicited comments in the prior order does not mandate adherence to the same procedures in this case.[3] This is particularly true where our action is compelled by the exigencies of the shortage of natural gas for the impending winter heating system. Moreover, the effect of our present order is only to extend the authorization of emergency operations by pipelines from our previously approved 60

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[1] 5 U.S.C. § 553 (b) (3) (B).

[2] 44 FPC 1574 (1970).

[3] Compare *City of Chicago* v. *F.P.C.*, 458 F.2d 731 (D.C. Cir. 1971), *cert. denied* 405 U.S. 1074 (1972).

day period to 180 days.[4] However, even though the Commission is not required to provide for notice and comment as a matter of law, upon reconsideration we have determined to allow public comment as to whether or not Order 491 represents a reasonable accommodation of alternatives to alleviate the critical natural gas shortage for the 1973-74 winter heating season. To allow the parties to properly focus their comments and thus increase their usefulness to the Commission, we are providing a more detailed statement of the evidence indicating an energy shortage of critical magnitude during the approaching winter heating season.

In Order No. 491 we indicated that a substantial increase in curtailment of gas supply was projected for the major pipelines during the 1973-74 season. The effects of such curtailments to which the Commission must respond was also pointed out (mimeo 4):

> Such curtailments will result, as they did last year, in severe economic and environmental consequences, resulting in the closing of schools and factories, the denial of utility service to new customers, the utilization by industry and electric utilities of alternate fuels which impact upon ambient air quality standards, and the transfer of unfulfilled demand to other fuels in short supply with the resultant upward price pressures.

[4] Previous 60-day emergency sales have been extended for periods of up to an additional 120 days. Cf. Docket No. CI73-621.

The supply data from which we have concluded that immediate action is required, is contained in a report recently issued by our staff.[5] That report is, in turn, an updating of the information reported July 15, 1973,[6] entitled "Firm Requirements and Curtailments of Major Interstate Pipeline Companies." Our staff's revised report indicates (after eliminating intercompany transactions) that eleven of thirty-three reporting companies had experienced curtailments of approximately .4 trillion cubic feet for the period April through October 1972 (summer season). For the same period in 1973, thirteen companies reported actual and estimated curtailments[7] totaling slightly more than .7 trillion cubic feet. This represents an increase in curtailments of 75 percent over the same period one year ago. Similarly, fifteen companies reported actual curtailments of .4 trillion cubic feet during the period November 1972 through March 1973 (winter season). For the approaching 1973-74 winter season, fourteen companies estimated curtailments totaling approximately .5 trillion cubic feet—an increase of 25 percent. Furthermore, the supply deficiencies for the 1973-74 heating season which were projected in the July 1973 report have substantially increased in the September report. This indicates that the major pipeline companies are experi-

[5] FPC News Release No. 19640.

[6] FPC News Release No. 19441.

[7] April through July volumes were actual, whereas, August through October volumes were estimated.

encing increasing difficulty in obtaining sufficient gas to maintain reliable service. The following table represents the extent of curtailed service each of the major pipeline companies projects for the 1973-74 season (April 1973 through March 1974):

	Firm Requirement Mcf	Volumes Curtailed Mcf	Percent Curtailment
*Algonquin	177,935,800	17,431,500	10.0
Arkansas-Louisiana	495,548,000	119,887,965	24.0
Cities	571,164,000	29,856,000	5.0
Columbia	1,532,573,000	12,574,000	1.0
El Paso	1,906,747,000	147,474,427	8.0
*Louisiana-Nevada	147,271,334	56,700*	Negligible
Mississippi River	209,296,000	7,996,118	4.0
Natural	1,207,139,000	228,868,178*	19.0
Northern	896,000,000	11,800,000	1.0
Panhandle	825,708,000	36,079,308	4.0
Texas Eastern	1,081,814,000	164,503,788	15.0
Transco	1,097,152,000	141,018,748	13.0
Transwestern	360,532,000	20,759,957	6.0
Trunkline	597,986,000	165,601,429	28.0
United Gas	1,602,798,000	541,937,052	34.0

* Summer curtailment only.

Furthermore, all of the above pipelines, with the exception of Algonquin and Louisiana-Nevada, have been obtaining some gas under the Commission's present emergency purchase provisions. The projected curtailments would thus be even greater without the increments provided by such temporary purchases.

The effects that such curtailments are having on the distributor and industrial customers of these pipelines are evidenced by the increasing number of petitions for extraordinary relief from curtailment presently being received by the Commission. A listing of the more recent petitions for relief, and a brief summary of each, follows:

Arkansas Louisiana Gas Company—Docket No. RP 71-122

Arkansas Lightweight Aggregate Corporation

Relief required to operate kilns. No alternate fuel capability installed. Without relief, production would be reduced by 50 percent and several employees would be laid off.

El Paso Natural Gas Company—Docket No. RP72-6

City of Wilcox, Arizona and Arizona Electric Power Cooperative, Inc.

Relief required for safety and reliability of its electric generating plant. No alternate fuel supplies.

City of Mesa, Arizona

Relief required to avoid possible endangerment of residential and commercial service.

Department of Water of the City of Los Angeles and Southern California Edison Company

Relief required to prevent curtailment of firm electric loads. No alternate fuel supplies.

Florida Gas Transmission Company—Docket No. RP 71 128

Edgar Plastic Kaolin Company

Relief to continue operations. Alternate fuels (propane and butane) are not avail-

able. Without relief production would be reduced 30 to 40 percent and a 3 to 4 month shut-down or possibly the closing of its plant.

Panhandle Eastern Pipe Line Company—Docket No. RP71-119

DeKalb Agresearch, Inc.

Relief required to dry seed corn for next year's planting. No alternate fuel facilities and propane is not available. This plant's production represents a corn crop of nearly 40,000,000 bushels.

Michigan Seamless Tube Company

Relief required to avoid shut down until alternate fuel capability is installed (560 employees).

Eugene W. Stallings (an independent oil producer)

Relief required to operate compressor engines and treat oil produced in an in-situ (fire flood) oil recovery operation. Program would be uneconomical if equipment has to utilize other fuels.

As the winter season arrives, additional requests for relief will undoubtedly be received. Furthermore, some, if not most, of these requests will require determination after formal hearings. This Commission will thus become increasingly burdened in resolving these requests and some petitioners will sustain serious operational and economical injury during the interval.

Although the projected deficiencies in gas supply are endemic to the nation as a whole, our studies show that certain areas of the country will be particularly hard hit. These regions [8] include: the Gulf Coast, Pacific Southwest, Appalachian, Great Lakes, and Southwest. (See attached Appendix A). The problem is compounded by the fact that these same regions are also faced with severe shortages of suitable alternative fuels, such as propane and distillate fuel oil. Indeed, it is this high degree of interdependence between the available natural gas and the supply of suitable alternative fuel, such as propane and number 2 heating oil, that further exacerbates our overall energy problem. This is indicated by data presented to the Commission, by various state regulatory bodies in response to our request for specific fuel supply information, in which each state outlines the extent and effect of immediate and projected shortages of primary fuels. These responses [9] concluded that additional curtailments of natural gas this winter will force many industrial plants to operate part-time or shut down completely. Many of these plants could have relied on propane as a satisfactory alternative fuel. However, the equally severe shortage of propane fuel would eliminate this safeguard. In testimony

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[8] The names of these regions refer to the designations by the Future Requirements Committee.

[9] See telegraphic request of August 15, 1973, from Chairman Nassikas to state regulatory utility agencies. Responses to this request were received between August 20—September 21, pertinent excerpts of which are attached as Appendix B.

given at a public hearing instituted by the White House Energy Policy Office on September 7, 1973, many of the Nation's largest propane suppliers testified that supplies for the 1973-74 heating season would be 15-25 percent *less* than the amount available for the 1972-73 season.

The situation regarding fuel oil supplies does not appear quite as bleak as that of natural gas and propane. However, strong evidence exists indicating a shortage of even these petroleum products, especially home heating oils. In a Notice issued August 27, 1973, the White House Energy Policy Office established a public hearing to be held on September 6, 1973. At the hearing comments and testimony were received on all phases of the "Proposed Program to Establish Priorities and Allocate Supply for Certain Low Sulfur Petroleum Products". These comments and testimony document the existence of a generally tight fuel oil supply, with severe shortage evident in certain areas of the country in home heating quality oils. In order to make available supplies of this product for human needs and other essential requirements, the supply of heating oils for industrial consumption must necessarily be decreased. Since many larger industrial natural gas customers have converted gas burning equipment to dual-fuel capbility in anticipation of continued gas shortage, the unavailability of oil as an alternative fuel will result in plant shut-downs. In some areas the reliability of electric generation may be threatened.

It was in response to this increasingly deteriorating energy situation that we initiated our present action. The 60-day emergency purchases and limited-term certificated previously authorized in Order Nos. 402,[10] 418,[11] and 431,[12] have not enabled the pipelines to avoid curtailing the firm, higher priority service along with lower priority, interruptible service. Clearly, further measures must be taken to increase the gas supply available to the vital interstate market during this coming winter. In this regard, we are mindful of our authority under Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), to "exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest." The courts have accorded wide discretion to the Commission's efforts to protect the adequacy of service to the consuming public.[13]

We believe that the provisions of Order No. 491 will increase the supply of emergency gas available to the interstate market during the coming winter. An extension of the period during which emergency sales can be made from 60 days to 180 days, will

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[10] 43 FPC 707 (1970), 43 FPC 822 (1970).

[11] 44 FPC 1574 (1970).

[12] 45 FPC 570 (1971).

[13] *F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 642 (1972); *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968); *Public Service Commission for the State of New York* v. *F.P.C.*, 467 F.2d 361, 367-69 (D.C. Cir. 1972).

assure the seller of the gas a more definite market for a given quantity of gas. The seller would thus be more likely to enter into a contract for emergency sales to the pipeline.

The fact of an assured supply over a longer definite time period also benefits the pipeline buyers, and in turn, their customers. As illustrated by Appendix C, a large number of pipeline companies utilize large volumes in underground storage to meet their requirements during the winter heating season. This more definite flowing supply will improve the flexibility afforded by this underground storage, thus permitting the pipelines to respond more effectively to the extreme circumstances affecting their own and their customers operations during the winter period. Similarly, assured 180 day emergency supplies entering the interstate market in the latter part of the winter season will enhance the pipelines' ability to manage their usual supply sources more effectively during next summer's storage injection season.

As we indicated in Order No. 491, we will review the rates and volumes of natural gas under these revised procedures, to determine the efficacy of our policy to cope with the existing emergency for the 1973-1974 winter heating season, and take whatever action is warranted to serve the overall public interest. The rate at which these emergency volumes are committed to interstate pipelines will be examined in our pipeline regulatory review under Sections 4 and 5 of the Act, in the same manner as purchases are reviewed under the prior emergency procedures.

New York questions whether or not the extension from 60 to 180 days is required to meet the projected needs for the 1973-1974 winter heating season. From 1970 through May 1973, 442 60-day emergency purchases were initiated at prices ranging from 35-54 cents per Mcf with volumes aggregating 385 Bcf. From 1971 through May 1973, 226 limited-term certificates were initiated at prices ranging from 30-45 cents per Mcf and for volumes of 792 Bcf. Under Order No. 491, the limited-term certificate procedures were stayed, pending further Commission review and order. The 60-day period is too short to obtain sufficient commitments for this winter heating season and we fully anticipate that commitments will increase by the extension of the term to 180 days, thus alleviating the short-term emergency conditions for this winter. In staying that portion of 2.70(b)(3), providing for limited-term certificates under paragraph 12 of R-389-A, 35 *Fed. Reg.* 11638, we anticipate long-term dedications (in addition to the 180-day short term emergency purchases) under the optional certificate procedure, the area rate procedure, or petitions for special relief from area rates. However, as we review the volumes and rates of gas which is committed pursuant to these amended procedures, we will consider whether the public interest requires reinstatement of limited-term certificates with pregranted abandonment.[13a] Because of

[13a] Order No. 491 (mimeo. at 5-6).

our mandatory review prior to March 15, 1974, and through the advance reporting procedures prescribed in Order No. 491, we will closely monitor and review the results of these emergency procedures in fulfilling our Congressionally delegated mandate to assure adequate and safe service to the Nation's gas consumers during this emergency period and will determine whether any modification is necessary to serve the public interest.

As can be seen from the foregoing,[14] there is uncontroverted and substantial evidence that an emergency will be present for significant segments of gas consumers for the 1973-1974 winter heating season. The evidence before us requires prompt Commission action, the result being Order No. 491. However, we will provide for procedures so that an interested person may file written comments, as well as written responses to comments in Docket No. RM74-3, concerning alternative emergency measures for the short-term situation. After receipt of those comments and responses, the Commission will issue an order on reconsideration in Docket No. RM74-3, on or before November 13, 1973.[15]

New York and Consumer Federation, *et al.* also request a stay of the effectiveness of Order No. 491

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[14] Neither New York nor Consumer Federation, *et al.* contest that an "emergency" exists.

[15] New York avers that we were "tardy" in issuing Order No. 491. However, FPC Press Release No. 19640, issued September 17, 1973, containing the most recent curtailment projections, was only recently available to us.

pending consideration of their applications for rehearing, contending "irreparable injury to the interests of New York gas consumers" (New York at 2) and that a stay would "prejudice no one for the effect of a stay would be to reinstate the 60-day and limited-term procedure of Orders No. 418 and 431" (Consumer Federation, *et al.* at 13). In determining whether or not to stay the effectiveness of its order pending further review, this Commission applies the standards enunciated by the D.C. Circuit in *Virginia Petroleum Jobbers* v. *F.P.C.*[16] Under these guidelines, to prevail in staying our order, the petitioners must show:

(1) likelihood of prevailing on the merits of their requested review;

(2) that they will suffer irreparable injury if the stay is not granted;

(3) that other parties will not be substantially harmed by granting the stay; and

(4) that the public interest will be served by granting the stay.

In the instant case, neither petitioner has met these standards.

The only possible references to a claim of prevailing on the merits occurs in New York's contentions that the Commission has overstepped its Section 7(c) authority (New York at 5-7). However, even here New York admits that "[I]t is arguable that the

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[16] 259 F.2d 921 (D.C. Cir. 1958).

sixty day period previously prescribed by the Commission's Rules in which producers can operate without a certificate * * * is an appropriate exercise of the Commission's authority under Section 7(c) * * *". This in no way indicates the probability of success that must be shown under the *Virginia Petroleum* doctrine.

Even less substantial are the Petitioners' claims of irreparable injury unless we stay the effectiveness of our order. The only harm alluded to on this point involves possible increases in prices to some consumers while the emergency provisions are in effect. However, as we have stated above (p. 8), the rates at which any emergency purchases are made pursuant to this order will be subject to our full regulatory review subject to Sections 4 and 5 of the Natural Gas Act. Moreover, the emergency procedures established by Order Nos. 402, 418 and 431 (See Order No. 491 at 2-3) are legal regulations of this Commission, and no longer subject to court review. The effect of Order No. 491 was limited to merely extending the term of the measures prescribed therein from 60 days to 180 days. As Consumer Federation indicates (Consumer Federation at 13), the effectiveness of Order No. 491, from its date of issuance until November 13, 1973, i.e. 60 days, is the same as would be the case under existing lawful regulations. There is thus no change in the *status quo* until after November 13, 1973, and to contend

otherwise, represents a collateral attack upon existing regulations.[17]

When we consider the final factors that must be shown, i.e., whether other parties or the public interest in general will be served, it is clear that we must deny the stay of our present order. As has been previously shown, it is the critical magnitude of the gas supply deficiency with its threatened immediate harm to the *entire* consuming public that mandates our emergency action. To grant the Petitioners' request would be an acceptance of the paradoxical reasoning that, having determined the appropriate action with which to respond to an emergency situation, we will now wait until a more appropriate time to implement that action. Such an argument is untenable. Our present action represents a clear case where the fulfillment of our statutory duties requires "the interest of private litigants to give way to the realization of public purposes." (*Virginia Petroleum Jobbers, supra,* 925). Inasmuch as petitioners have failed to meet the standards required for grant of a stay as set forth in *Virginia Jobbers* and have failed to show how the continued effectiveness of order No. 491 (at least for a period of 60 days from its issuance) in any way undermines their interests, the motions for stay are denied.

New York and Consumer Federation, *et al.* have petitioned to intervene in Docket No. RM74-3. Be-

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[17] Cf. *F.P.C.* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 497 (1955)

cause of the modified procedures set forth *infra*, we will deny their petitions to intervene, because they, along with all other interested persons, are afforded the opportunity to comment on the procedures prescribed in Order No. 491. Those additional arguments raised by New York and Consumer Federation, *et al.*, to the extent not addressed in either Order No. 491 or in this order, are deferred for further consideration in the order to be issued after receipt of comments.

For purposes of clarification, the only modification to Sections 157.22 and 157.29 of our Regulations under the Natural Gas Act was the extension of time of an emergency transaction from 60 days to 180 days. The exemption from Section 7(c) certification authorization is restricted to pipelines to:

> assure maintenance of adequate natural gas service where interruption or serious curtailment of service exists or is threatened because of failure of facilities or failure or curtailment of supply or unusual and unexpected demand on such facilities or supply. § 157.22(a) and § 157.29.

Additionally, such pipeline purchasers should also have on file with the Commission a curtailment plan pursuant to Section 2.70(b)(2)(i) to be eligible for such emergency purchases.

The Commission orders that:

(A) New York and Consumer Federation, *et al.*, motions for stay of Order No. 491 are denied.

(B) New York and Consumer Federation, *et al.*, petitions to intervene in Docket No. RM74-3 are denied, without prejudice to the submission of comments, as provided in (C) and (D) herein.

(C) Any interested person may file written comments concerning the modification of emergency measures prescribed by Order No. 491 with the Secretary at the Federal Power Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, by October 8, 1973. The submittal shall state the name, title, qualifications, mailing address, and telephone number of the person or persons to whom communications concerning this matter should be addressed. An original and fourteen conformed copies of such response shall be filed with the Commission.

(D) Responses to the submittals shall be filed no later than October 17, 1973, in the same form and number as the original submittals.

(E) All submittals and responses shall be under oath and acknowledged by a notary public or comparable official, and that the person making such filing is authorized to verify and file the document and that all statements contained therein are true and correct to the best of his knowledge.

(F) New York and Consumer Federation, *et al.*, applications for rehearing of Order No. 491 are treated as motions for reconsideration and will be deferred and taken under advisement pending further Commission or-

der, on or before November 13, 1973, after receipt of the comments provided in (C) and (D) above.

By the Commission.

[SEAL]

Mary B. Kidd
Acting Secretary

APPENDIX A

TABLE I

ESTIMATED IMPACT OF NATURAL GAS CURTAILMENTS ON FINAL CONSUMERS
(Billions of Cubic Feet)
Winter 1973-1974

Future Requirements Committee Region		Firm				Interruptible		
		Residential	Commercial	Industrial	Electric Utility	Industrial [1]	Electric Utility	Total
I	New England	0.0	0.0	2.0	0.0	7.8	0.6	10.4
II	Appalachian	0.0	0.0	26.9	0.4	38.9	18.6	84.8
III	Southeast	0.0	0.0	5.7	2.4	30.8	10.7	49.6
IV	Great Lakes	0.0	0.4	19.0	3.5	34.9	8.3	66.1
V	Northern Plains	0.0	0.0	0.0	0.0	0.0	5.8	5.8
VI	Mid-Continent	0.0	0.0	0.0	0.7	5.7	30.7	37.1
VII	Gulf Coast	0.0	0.0	115.8	129.4	34.5	0.0	279.7
VIII	Rocky Mountain	0.0	0.0	0.0	0.0	0.1	0.0	0.1
IX	Pacific Southwest	0.0	0.0	0.0	0.0	0.0	95.3	95.3
X	Pacific Northwest	0.0	0.0	0.0	0.0	0.1	0.0	0.1
	Total	0.0	0.4	169.4	136.4	152.8	170.0	629.0

Note: Customers are listed from left to right in descending order of priority.

[1] Includes minor volumes of curtailments to commercial consumers.

TABLE II

ESTIMATE OF FUELS REQUESTED TO SUBSTITUTE
FOR CURTAILED VOLUMES OF NATURAL GAS
Commercial, Firm and Interruptible Industrial Sectors

Winter 1973-1974

Future Requirements Committee Region		Fuel Oil: Distillate Trillion Btu	Fuel Oil: Distillate 1000 Bbls	Fuel Oil: Residual Trillion Btu	Fuel Oil: Residual 1000 Bbls	Coal Trillion Btu	Coal 1000 Tons
I	New England	0.7	113	9.2	1,457	0.3	10
II	Appalachian	4.0	689	26.5	4,216	37.0	1,414
III	Southeast	9.4	1,618	22.0	3,503	6.0	232
IV	Great Lakes	3.1	532	7.5	1,201	44.0	1,679
V	Northern Plains	0.0	0	0.0	0	0.0	0
VI	Mid-Continent	0.5	84	2.0	316	3.4	130
VII	Gulf Coast	59.2	10,171	60.5	9,627	10.0	381
VIII	Rocky Mountain	0.0	0	0.0	0	0.1	5
IX	Pacific Southwest	0.0	0	0.0	0	0.0	0
X	Pacific Northwest	0.0	0	0.1	22	0.0	0
	Total	76.9	13,207	127.8	20,342	100.8	3,851

APPENDIX B

EXCERPTED QUOTES FROM STATE FUEL REPORTS

State	*Comments*
California	Acquisition of sufficient gas and fuel oil to satisfy foreseeable generating requirements during the forthcoming winter heating season and subsequently through 1976, is the specific energy supply problem most urgently facing California electric utilities. It will be noted from Table 1 page 2 that the estimated decline in gas fuel supply from 65.8 million barrels in 1973 to 25.5 million barrels in 1974 results in as yet uncovered requirement for residual fuel oil of 57.7 million barrels in 1974. Similarly uncovered fuel oil requirements for 1975 are 76.2 million barrels and 56.1 million barrels for 1976. At present it appears that unless additional gas is made available or gas service priorities are revised, it is likely that electric curtailment will occur during 1974. There are 10 liquefied petroleum gas utilities in California that will have an estimated requirement of almost 140,000 barrels of propane for the year 1973. These utilities' customers are limited to the residential and commercial type. Their 1973-1974 winter requirement will be slightly in excess of 55,000 barrels for the months of December, January and February. The precise disparity in supply and utilities requirements is now under evaluation. The first indications are that those utilities not owned by large propane companies may have supply problems this winter. It appears these supply problems may be intensified if the proposed mandatory alloca-

State	*Comments*
California (continued)	tion procedures of the Energy Policy Office are put into effect, with public utilities ranking next to last in the eighth priority classification.
Colorado	In summary, Colorado will experience a greatly intensified demand for all alternate fuels with utilities, gas and electric, sharing the best position. A need for all energy users to at least hold to the 1972/73 levels is to us obvious, unless producers come up with reliable assurances that they can and will provide the indicated total quantities of fuels.
Florida	The anticipated requirements for LP gas for the winter season is 350-400 million gallons with an anticipated shortage of 5-7%. We have been informed by the Florida LP Gas Association that the various distributor companies have filled the tanks of residential and commercial customers unless there is a severely cold winter season.
New Hampshire	The problem facing the companies rests with propane availability—they have been served notice by the suppliers that winter contracts may not be met, at least on the terms normally expected in the past. Traditionally, gas companies have purchased LPG on a winter-summer relationship of at least two to one, with shipments arriving by rail car or truck transport on a schedule which minimizes the amount of on-site storage; therefore, whereby five carloads per week might suffice during the summer season when only the company's bottled gas business required product, ten cars per week would be delivered during the winter when peak-shaving was necessary.

State	*Comments*
New Hampshire (continued)	The companies have been told that these delivery schedules will no longer be honored. LPG will be brought in primarily on a constant one-to-one schedule, and the only way they can be assured of enough product to carry them through the winter will be to install sufficient on-site storage to build up a tremendous supply during the summer. It will be noted that Gas Service, Inc., Manchester Gas Co. and Concord Natural Gas Corp. are doing exactly that, and the investment costs are staggering. To compound the problem, the companies are now receiving feed-back from the LPG suppliers that this one-to-one schedule may not even be assured. They are continuously revising their estimates of projected supply availability, and it appears they will continue to do so right into the peak-shaving season.
New York	The State of New York is dependent upon every fuel you have mentioned, and all of our investigations indicate a shortage for each fuel, some potentially more serious than others. *Natural Gas* Curtailments by the major interstate pipelines serving New York during the 1973-74 heating season are anticipated to be over 30 billion cubic feet or approximately 15 billion cubic feet more than occurred during the last heating season. The curtailments will be partially offset by almost 6 billion cubic feet of alternative gas sources. The main impact of the deficiency this winter will be on the combination util-

State	*Comments*
New York (continued)	ities where there will be a reduction in the amount of natural gas available for boiler fuel for electric generation of about 15 billion cubic feet, 10.5 billion cubic feet worse than last year. The impact upon retail interruptible customers will only be slightly greater this coming heating season than they experienced last season. We estimate curtailments of interruptible customers amounting to 8.5 billion cubic feet, 1.5 billion cubic feet more this heating season than last heating season. Almost all interruptible customers were completely curtailed during the last heating season. During sustained cold spells, firm industrial sales and large commercial uses may also be affected in the course of a "normal winter." With respect to special problem areas concerning natural gas, it should be noted that substantial volumes of gas are used within the State in the agricultural industry. Agricultural customers are served under industrial rate classifications and are not separately identifiable. It is important to note, however, that assuming normal weather conditions, the volumes of gas required by agriculture will be substantially greater than the volumes consumed by this industry in New York last year. Last year the severe floods associated with Hurricane Agnes destroyed crops and resulted in a reduced natural gas requirement. Since this Commission's restrictions include volumetric limitations based on the highest annual use during the three years preceding our restrictions, the utilities serving

State	*Comments*
New York (continued)	agricultural customers have planned to meet the historic limitations, not the below-normal agricultural consumption of gas last year. They would not, however, take into account increased crop sizes. *Propane and Other Liquid Petroleum Gases* The information we have indicates approximately a 1% deficiency of supply against estimated total requirements of 150 million gallons, assuming a normal winter. There is concern, however, that railroad and pipeline transport difficulties may cause temporary shortages, especially during the peak of winter. In addition, concern was voiced that suppliers might not fully deliver on contracts. Some distributors indicated that transport and weather conditions could cause shortages of 10-20%, but that such an imbalance would be "solved" by curtailing industrial users and encouraging residential conservation by limiting deliveries to partial fills or emergency service only. *Distillate Fuel Oil* Although supplies for this season are expected to remain at last year's levels, indications are that requirements have increased by as much as 5% under normal weather conditions. Most major petroleum companies in the State indicated their ability to supply oil at volumes equal to 1972 levels. Some could not do as well. Obviously, this leaves no room to accommodate growth in demand or to care for increased needs in a severe winter. More important, the big independ-

State	*Comments*
New York (continued)	ent dealers in the market indicated that their stocks were low. It is apparent that they are concerned about their ability to meet even past demand. *Residual Fuel Oil* As is the case with distillate oil, the major oil suppliers to the State have indicated that supplies of residual oil are expected to remain at last year's levels while requirements are expected to increase at a rate of 7% annually. A major portion of the increase is required by electric utilities, because of growth in power demand and because of the shortage of natural gas.
North Carolina	It appears at this time that our most critical areas relating to availability of fuel during the winter heating season will be propane, kerosene and number 2 heating oil for agriculture, commercial and home heating. Number 2 heating oil availability for industrial purposes could create a most serious problem if there are additional curtailments of natural gas over and above that resulting from the interim curtailment plan. This matter was discussed in the letter of August 21, 1973, from the North Carolina Utilities Commission and will be elaborated on in detail at the Federal Power Commission hearings scheduled for September 18, 1973. However, we desire to point out that we are by no means certain that sufficient number 2 heating oil will be available to fill the needs of aditional product required by industry even under the interim curtailment plan. One of the primary reasons for our shortage of number 2 heating oil, kerosene and LPG in the State of North Carolina is that two of the

State	*Comments*
North Carolina (continued)	major suppliers, British Petroleum (BP) and Atlantic Richfield (ARCO), have recently withdrawn completely from the State. A specific problem area which exists in the State of Ohio is that of the grain harvest. The outlook indicates a late, wet harvest which will require more propane and natural gas than has been estimated for a normal harvest (per FPC's request). The Commission provides that industrial customers generally are curtailed first, so residential and commercial customers should have an adequate natural gas and propane supply. This will alleviate the situation to an extent, but it will by no means solve the shortage problem. To date Ohio's small propane distributors have been unable to secure more than 20% of their estimated need for the late harvest season. Of five distribution companies that utilize propane for peak shaving, two report adequate stock in storage for normal winter requirements. Both hope to make replenishment purchases. The remaining three companies are short 12% (1½ million gallons), 50% (496,000 gallons) and 67% (102,000 gallons). None of these have been able to contract for the requirements as of this writing.
Virginia	*Motor Fuels and Heating Oils* From November, 1972 through March, 1973, Virginia used 1,155,879,859 gallons of motor fuel. Most projections are on the increase for 1973 of about 7% if the winter is normal. This means the State will need about 1,236,927,000 gallons of motor

State	*Comments*
Virginia (continued)	fuel to get it through the winter in good shape. The Commonwealth used about 1,053,533,-000 gallons of all types oil for household use in 1972. An average increase of 7% is expected this winter if it is not severe. About 84% of the year's total is used in the months from November through March. Virginia then will need about 946,915,345 gallons of all types fuel and heating oils for this coming 1973-74 winter. Of this amount, 469,124,000 gallons will be #2 fuel oil and 204,164,000 gallons will be kerosene. The Commonwealth of Virginia has bought both kerosene and #2 fuel oil to provide its citizens if a shortage does arise and from indications already received, it does seem there will be one. We do not know just how severe it will be though, and it is impossible to determine the degree to which the major oil companies will be able to meet the demand. *Liquid Petroleum Gas* The LP Gas Industry was canvassed by the LP Gas Association to determine supply, demand and end use. Approximately 39% of the respondents replied representing about 40% of the total gas volume used in the State, therefore, the information is of limited value. The LP gas situation at the time the query was first distributed in June was fairly good, however, by the last of August, the availability had deteriorated and allocations reduced to a critical stage in some instances. The consumer field storage is generally consider-

State	*Comments*
Virginia (contiuued)	ably lower than normal for this time of year.
Wisconsin	#1 fuel oil—critical #2 fuel oil—very tight Gasoline—barely adequate, with localized distribution problems Diesel—very tight Propane—terrible, compounded by distribution difficulties Natural gas—ok, given greater number of interruptions Coal—ok. Electric utilities have long-term contracts. We do not have any specific information as to the amounts of curtailment anticipated but it is assumed that interruptible customers will be interrupted more than they have been in the past. Some pipeline companies will have limited curtailment which may also mean that interruptible customers will be interrupted more than they have in the past. Such interruptible customers will find it difficult to obtain substitute fuels as they did last winter and as other industrial customers are experiencing problems in obtaining adequate supplies of oil and propane.

APPENDIX C

TABLE 1

UNDERGROUND STORAGE GAS AS REPORTED IN FORM NO. 8 AS OF 9/1/73
(MMcf)

	11/1/72	9/1/73	% 9/1/73 of 11/1/72	% 8/1/73 of 11/1/72
EASTERN AREA				
Columbia Gas Transmission Corporation	227,746	197,489	86.7	68.9
Consolidated Gas Supply Corporation	163,074	132,540	81.3	61.5
Equitable Gas Company	29,776	29,486	99.0	88.7
Hampshire Gas Company & Washington Gas Light Company	2,875	3,908	135.9	131.2
Iroquois Gas Corporation	16,714	16,201	96.9	78.1
North Penn Gas Company	9,441	6,723	71.2	61.1
Pennsylvania Gas Company	11,779	11,013	93.5	82.1
Tennessee Gas Pipeline Company	32,739	28,125	85.9	61.2
Texas Eastern Transmission Corporation	75,346	59,742	79.3	61.5
Transcontinental Gas Pipe Line Corporation	78,147	72,374	92.6	75.2
United Natural Gas Company	25,468	20,592	80.9	61.8
EASTERN AREA TOTAL	673,105	578,193	85.9	68.5

72a

MIDWESTERN AREA				
Cities Service Gas Company	59,815	52,951	88.5	77.2
Kansas-Nebraska Natural Gas Company	18,866	18,546	98.3	98.2
Michigan Gas Storage Company	38,872	33,404	85.9	64.8
Michigan Wisconsin Pipe Line Company	123,176	109,760	89.1	79.3
Midwestern Gas Transmission Company	3,450	3,395	98.4	82.6
Mississippi River Transmission Corporation	22,566	23,714	105.1	88.0
Natural Gas Pipeline Co. of America	160,965	155,717	96.7	85.4
Northern Natural Gas Company	35,173	16,462	46.8	28.3
Panhandle Eastern Pipe Line Company	24,611	19,290	78.4	65.9
Texas Gas Transmission Corporation	45,472	45,909	101.0	88.0
Union Gas System, Inc.	3,155	2,765	87.6	81.9
Union Light, Heat & Power Company	201	204	101.5	102.0
MIDWESTERN AREA TOTAL	536,322	482,117	89.9	77.5
WESTERN AREA				
Colorado Interstate Corporation	11,264	11,052	98.1	89.7
Lone Star Gas Company	9,266	8,024	86.6	79.6
Montana Dakota Utilities Company	145,617	143,257	98.4	96.8
Mountain Fuel Supply Company	1,703	3,045	178.8	148.7
Washington Natural Gas Co. & El Paso Natural Gas Company	6,700	7,805	116.5	105.3
WESTERN AREA TOTAL	174,550	173,183	99.2	96.2

73a

TABLE 1—Continued

	11/1/72	9/1/73	% 9/1/73 of 11/1/72	% 8/1/73 of 11/1/72
SOUTHERN AREA				
Arkansas Louisiana Gas Company	13,093	10,906	83.3	70.0
Arkansas Oklahoma Gas Corporation	1,005	832	82.8	90.0
Mid Louisiana Gas Company	3,548	4,252	119.8	90.6
Southern Natural Gas Company	34,903	37,841	108.4	98.4
United Gas Pipe Line Company	34,844	30,232	86.8	68.6
SOUTHERN AREA TOTAL	87,393	84,063	96.2	81.9
GRAND TOTAL	1,471,370	1,317,556	89.5	75.9

TABLE 2

REPLENISHMENT OF NET STORAGE WITHDRAWALS SINCE 4/1/73 [1]

(Thousand Mcf—14.73 Psia)

	Cushion Gas	Top Storage	Total
EASTERN AREA:			
Net Withdrawals 11/1/72 to 4/1/73	4,523	494,428	498,951
Net Injections 4/1/73 to 9/1/73	4,611	399,516	404,127
Percent Replenished @ 9/1/73	101.9	80.8	81.0
MIDWESTERN AREA:			
Net Withdrawals 11/1/72 to 4/1/73	5,476	319,890	325,366
Net Injections 4/1/73 to 9/1/73	24,450	265,685	290,135
Percent Replenished @ 9/1/73	446.5	83.1	89.2
WESTERN AREA:			
Net Withdrawals 11/1/72 to 4/1/73	149	24,330	24,479
Net Injections 4/1/73 to 9/1/73	900	22,963	23,863
Percent Replenished @ 9/1/73	604.0	94.4	97.5
SOUTHERN AREA:			
Net Withdrawals 11/1/72 to 4/1/73	17,173	49,263	66,436
Net Injections 4/1/73 to 9/1/73	17,173	45,933	63,106
Percent Replenished @ 9/1/73	100.0	93.2	95.0
TOTAL ALL AREAS:			
Net Withdrawals 11/1/72 to 4/1/73	27,321	887,911	915,232
Net Injections 4/1/73 to 9/1/73	47,134	734,097	781,231
Percent Replenished @ 9/1/73	172.5	82.7	85.4

[1] End of 1972-1973 winter heating season.

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., and William L. Springer.

Docket No. RM74-3

Policy with Respect to Establishment of Measures to be Taken for the Protection of Reliable and Adequate Service for the 1973-1974 Winter Heating Season

ORDER NO. 491-B
ORDER ON RECONSIDERATION

(Issued November 2, 1973)

On September 14, 1973, acting pursuant to our exemption authority under Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), we issued Order No. 491 which amended Sections 2.68 and 2.70 of the Commission's General Policy and Interpretations and Sections 157.22 and 157.29 of the Commission's Regulations under the Natural Gas Act. The effect of those amendments was to extend from 60 days to 180 days the term under which a pipeline experiencing shortage on its system could make emergency purchases of natural gas without Commission certification. In addition, Order No. 491 stayed further utilization of the procedure outlined in Order No. 431

whereby producers could apply for and receive limited term certificates with pregranted abandonment.

Because immediate action was required to meet the demands of some 43 million gas consumers for the 1973-74 winter heating season, we issued Order No. 491 without prior notice and opportunity for comments. We explained, however, that notice was not required by the Administrative Procedure Act (APA) when, as here, such would be "impracticable, unnecessary, or contrary to the public interest." [1] Nevertheless, the Public Service Commission of the State of New York (New York) and the Consumer Federation of America, *et al.* (Consumer Federation) filed applications for rehearing and motions for stay, alleging *inter alia* that our action was procedurally defective.

On September 25, 1973, in response to the applications of New York and Consumer Federation, we issued Order No. 491-A reaffirming our conviction that notice and comments were not imperative as a matter of law because of the exigencies of the shortage of natural gas for the impending winter. Nevertheless, we invited comments to be filed by any interested person on or before October 8, 1973. Responses to the initial submittals were to be filed on or before October 17, 1973.

We refused to stay Order No. 491 pending the receipt and analysis of comments, our reasoning being

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[1] 5 U.S.C. § 553(b)(3)(B).

that New York and Consumer Federation had failed to demonstrate the necessity for a stay in the light of the criteria outlined in *Virginia Petroleum Jobbers Association* v. *F.P.C.*, 259 F.2d 921 (D.C. Cir. 1958).[2] We particularly noted that since 60 day emergency purchases were permissible under final and unappealable Commission orders previously issued,[3] the *status quo* would be unaffected by Order No. 491 until November 13, 1973, 60 days following its issuance. Since our final order after comments was to be issued before November 13, 1973, we concluded that the denial of the stay would not create irreparable injury. To the contrary, denial of the stay was necessary to *prevent* irreparable injury, as we noted (Order No. 491-A, p. 11):

> * * * [I]t is the critical magnitude of the gas supply deficiency with its threatened immediate harm to the *entire* consuming public that mandates our emergency action. To grant the Petitioners' request would be an acceptance of the paradoxical reasoning that, having determined the appropriate action with which to respond to

[2] Under *Virginia Petroleum Jobbers*, petitioners are not entitled to a stay unless they demonstrate (1) the likelihood of prevailing on the merits of their requested review; (2) that they will suffer irreparable injury if the stay is not granted; (3) that other parties will not be substantially harmed in granting the stay; and (4) that the public interest will be served by granting the stay.

[3] Orders Nos. 402 and 402-A, 43 FPC 707 (1970); 43 FPC 822 (1970); Order No. 418, 44 FPC 1574 (1970); Order No. 431, 45 FPC 570 (1971).

> an emergency situation, we will now wait until a more appropriate time to implement that action. Such an argument is untenable. Our present action represents a clear case where the fulfillment of our statutory duties requires "the interest of private litigants to give way to the realization of public purposes." (*Virginia Petroleum Jobbers, supra,* 925).

Notwithstanding substantial evidence regarding the critical supply situation facing consumers for the 1973-74 winter heating season,[4] Order Nos. 491 and 491-A were permitted to operate for only 19 days. On October 3, 1973, in an order which does not discuss the public interest considerations stated in *Virginia Petroleum Jobbers, supra,* the United States Court of Appeals for the District of Columbia Circuit issued an order staying Order No. 491 until final action by the Commission after comments.

Discussion

Upon the basis of the record established by the parties to this proceeding, and considering data and information which is a matter of public record (See Order No. 491-A, pp. 3-9), we have concluded that an extension of the emergency purchases term from 60 days to 180 days is imperative to improve gas supply from the interstate market so as to reduce the impact on the consuming public and our economy by deepening curtailments for the 1973-74 winter heating season. Moreover, we have concluded that

[4] See Order No. 491-A, pp. 2-9.

our effort to alleviate the shortage in this manner is consistent with both our service and rate responsibilities under the Natural Gas Act. Finally, we are persuaded that Order No. 491 is not a panacea for the supply problem and, accordingly, that the limited term certificate procedure should be retained.

I. *The Public Interest.*

In Orders Nos. 491 and 491-A, we provided a detailed analysis of the severity of the gas crisis facing consumers during the impending winter. Summarizing a recent staff report on past and projected curtailments,[5] we stated in Order No. 491 (*mimeo* at 4):

> * * * [C]urtailments for the 1973-1974 winter heating season are estimated to be .5 trillion cubic feet of natural gas; the equivalent of about 85 million barrels of oil. The report further indicated acute regional curtailments, both this summer and for the current winter-heating season, in the New England, Appalachian, Great Lakes and Northern Plains regions. Such curtailments will result, as they did last year, in severe economic and environmental consequences, resulting in the closing of schools and factories, the denial of utility service to new customers, the utilization by industry and electric utilities of alternate fuels which impact upon ambient air quality standards, and the transfer of unfulfilled demand to other fuels in short supply with the resultant upward price pressures. At least for the 1973-1974 winter-heating season, reliable and adequate gas service is even more jeopardized than at the juncture when we initiated emergency measures, *supra*, over three and one-half years ago.

[5] FPC News Release No. 19441.

In Order No. 491-A, we further observed that problems created by the natural gas shortage are exacerbated by the fact that other fuels, such as propane and fuel oil, are in short supply. Relying upon data furnished to the Commission by various state regulatory bodies in response to our request,[6] we concluded that (Order No. 491-A, *mimeo* at 6):

> * * * [A]dditional curtailments of natural gas this winter will force many industrial plants to operate part-time or shut down completely. Many of these plants could have relied upon propane as a satisfactory alternate fuel. However, the equally severe shortage of propane fuel would eliminate this safeguard.[7]

[6] See telegraphic request of August 15, 1973, from Chairman Nassikas to state regulatory utility agencies. Responses to this request were received between August 20, 1973, and September 21, 1973, pertinent excerpts of which are attached as Appendix B to Order No. 491-A.

[7] In testimony given at a public hearing instituted by the White House Energy Policy Office on September 7, 1973, many of the Nation's largest propane suppliers testified that supplies for the 1973-74 heating season would be 15-25 percent *less* than the amount available for the 1972-73 season. Mandatory propane allocations are now in force. Section 203 (a) (3) of the Economic Stabilization Act as amended by PL Mandatory Allocation Program for Propane 93-28; 12 USC 1904 (Note): EO 11695, 38 FR 1473; COLC Order 39, 38 FR 22909; 38 FR No. 191 at 27397, October 3, 1973.

Moreover, with regard to fuel oil supplies, we recognized (*mimeo* at 7):

> * * * the existence of a generally tight fuel oil supply, with severe shortage evident in certain areas of the country in home heating quality oils. In order to make available supplies of this product for human needs and other essential requirements, the supply of heating oils for industrial consumption must necessarily be decreased. Since many larger industrial natural gas customers have converted gas burning equipment to dual-fuel capability in anticipation of continual gas shortage, the unavailablity of oil as an alternative fuel will result in plant shut-downs. In some areas the reliability of electric generation may be threatened.

While five groups oppose the 120 day extension on essentially legal grounds (discussed *infra*),[8] no party to this proceeding seriously challenges our conclusions regarding the severity of the emergency presented in the 1973-74 winter.[9] Moreover, with the exception of those five groups, all of those filing comments support the 180 day exemption, as an effective means of coping with the emergency.

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[8] Consumers Union of the United States, *et al.*; Public Service Commission of the State of New York; Senators Humphrey, McGovern, Metcalf, Moss, Mondale, and Proxmire, and Congressmen Aspin, George Brown, Eckhardt, Fraser, Moss, and Reid; State of Connecticut; Consumer Federation of America, *et al.*

[9] In fact, New York expressly states that it "does not dispute the evidence of a gas supply emergency." New York Comments, p. 1.

We are convinced that an enlargement of the exemption period from 60 days to 180 days will elicit new gas supplies that would not otherwise be available to interstate consumers for the 1973-74 winter heating season. While quantification of the increment to be forthcoming is impossible, given our inability to compel a producer to sell to the interstate market and considering the limited supply of gas available to meet the total requirements of U.S. consumers, it is clear that a six month exemption period will enable interstate pipelines to secure needed gas on an emergency basis. To begin with, a six month emergency purchases term will permit the immediate commencement of deliveries of gas which might otherwise be postponed because of delay inherent in the administrative process. Secondly, as several comments indicate,[10] a six month sale is often necessary in order to justify the financial investment necessary to secure a sizable package of gas for the interstate market.[11] Thirdly, our action will provide a significant competitive advantage to pipelines facing emergencies; it will enable them to secure substantial gas supplies which might otherwise be lost to the intrastate market or interstate pipelines not facing an emergency.[12] Fourth, a six month sale without the administrative burden of

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[10] Comments of Sun Oil Company, p. 1; Comments of Tenneco Oil Company, p. 5.

[11] See, *e.g.*, Comments of Tenneco Oil Company, p. 5.

[12] See, *e.g.*, Comments of Exxon Corporation, p. 2.

certification will assure potential sellers of a more definite market, thereby encouraging contracts with interstate pipelines. Finally, sales over a six month period will assure that the supplies thereby elicited will be available throughout the winter heating season and not for just a part thereof.

Encouraging additional emergency purchases from producers is not the sole purpose of our order. We seek also to provide pipelines and distributors with needed flexibility to engage in short-term transactions with each other involving sales, transportation, exchanges, and storage operations. Under our 180-day exemption period, jurisdictional pipelines will be able to exchange gas when necessary to meet emergencies. Moreover, intrastate pipelines will be permitted to make deliveries to the critical interstate market. As the comments of Lowell Gas Company indicate, many of these short-term transactions require from five to six months to be consummated.[13]

[13] Notifications have been received from various pipeline companies advising that emergency sales, transportation, and exchanges have been initiated (see among others, telegram received October 1, 1973, from Transcontinental Gas Pipe Line Corporation involving transportation of gas for Consolidated Gas Supply Corporation from offshore Louisiana; see telegram from Tennessee Gas Pipeline Company, a Division of Tenneco Inc., filed September 5, 1973, wherein the banking of gas released by Brooklyn Union Gas Company for Lowell Gas Company was initiated; see telegram received October 9, 1973, in which the sale and exchange of gas between Panhandle Eastern Pipe Line Company, Trunkline Gas Company, Mississippi River Fuel Corporation and Consumers Power Company was commenced).

New York (Comments, p. 9) and Consumers Union (Comments, p. 6) suggest that Order No. 491 is unjustified because of the lack of certainty regarding the amount of gas that will be dedicated to interstate commerce pursuant to a 180 day exemption. Such "crystal ball" certainty, in our judgment is not required. We do know that from 1970 through May of 1973, 442 60-day emergency purchases were consummated bringing 385 Bcf of gas to the interstate market.[13a] Considering the additional incentives which are inherent in the 180 day exemption, it is reasonable to assume that pipelines will be able to secure far more gas on an emergency basis.

Moreover, the limited record in this proceeding reflects that the 180 day exemption was relatively successful during its ephemeral life of 12 working days between its issuance on September 14, 1973 and the court's stay on October 3, 1973. Contrasting the results of this period with comparable periods under the 60 day exemption both immediately prior to Order No. 491 and subsequent to the court's stay, one is compelled to conclude that the 180 day exemption has elicited, and will continue to elicit, more gas than would otherwise be available for the interstate market.[14]

[13a] Order No. 491-A, pp. 8-9.

[14] The results that follow were compiled by the Commission's Bureau of Natural Gas from data filed with the Commission pursuant to Orders Nos. 402, 418, and 491. We would have preferred, of course, to have had a longer test period

In the 12 working days immediately prior to Order No. 491, 20 new sales were initiated under the 60 day exemption dedicating 8,272,400 Mcf of gas to the interstate market at a weighted average cost of 50.82 cents per Mcf. During the next twelve working days during which the 180 day exemption was available, 26 new sales were initiated bringing 20,484,800 Mcf to the interstate market at a weighted average cost of 48.16 cents per Mcf. Finally, in the 12 working days which followed the court's stay, there were 24 sales of gas under the 60 day exemption dedicating 17,708,480 Mcf of gas at a weighted average cost of 47.44 cents per Mcf.[15]

Thus, our 180 day exemption generated more than twice the amount of gas that was made available in a comparable period under the 60 day exemption. It is also noteworthy that the weighted price average decreased rather than increased, under the 180 day exemption. This evidence, reflecting a twofold increase in supply with no increase in the weighted average cost lends support to our conclusion that Order No. 491 is required by the public interest.[16]

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than 12 days. This was impossible, however, since Order No. 491 was stayed 12 working days following its issuance.

[15] There were actually 26 sales under the 60 day emergency exemption consummated during this period. However, volume and cost information is not presently available regarding sales made by Crystal Oil Company and Patricia J. Mitchell.

[16] The volumes dedicated under the 60 day procedure during the 12 working days *subsequent* to the court's stay was substantially greater than the amount dedicated under the same procedure for the 12 working days *prior* to Order No. 491. This is explainable, however, because many of the dedications made after October 3, 1973, were made under the impression that the 180 day exemption would be applicable.

[17] See Note 8.

[18] Comments of Consumers Union, p. 7.

II. *Statutory Authority.*

Our authority to exempt emergency purchases from regulation for 180 days stems from a proviso in Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), which expressly states that:

> * * * the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, *and may by regulation exempt from the requirements of this section temporary acts or operations from which the issuance of a certificate will not be required in the public interest.* [Emphasis supplied.]

Without much reference to this exemption power, the opponents[17] to Order No. 491 claim that our action is unlawful because of Section 4(a) of the Act, 15 U.S.C. § 717c(a). As Consumers Union of United States, Inc. (Consumers Union) interprets Section 4(a), "sales of natural gas are lawful only if they are consummated at rates determined by the Commission to be just and reasonable."[18] [Emphasis suppplied.]

However logical this conclusion may be when Section 4(a) is read in isolation, neither the Supreme

Court nor the Commission has been so literal in its interpretation. For example, the Supreme Court in *CATCO* [19] approved a procedure of bifurcated rate review whereby sales may be commenced when shown to be required by the public convenience and necessity, even though no just and reasonable rate determination is made beforehand. The Court acknowledged that (360 U.S. at 390, 391):

> It is true that the Act does not require a determination of just and reasonable rates in a § 7 proceeding as it does in one under either § 4 or § 5. Nor do we hold that a "just and reasonable" rate hearing is prerequisite to the issuance of producer certificates.

Thus, it is permissible under the law to commence sales of gas in interstate commerce even though the rates of such sales have not been shown to be "just and reasonable" in accordance with Section 4(a) of the Act.[19a] Moreover, and perhaps more importantly, the Supreme Court has stated that the Commission does not have authority to order refunds of initial rates collected under a permanent unconditional certificate, notwithstanding that the just and reasonable rate is subsequently determined to be lower. *F.P.C.*

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[19] *Atlantic Refining Company* v. *Public Service Commission of New York*, 360 U.S. 378 (1958).

[19a] If a Section 4(a) determination of justness and reasonableness is not required by Section 7(c) prior to the commencement of service during periods of abundant supply, *a fortiori*, it is not required during periods of critical emergency.

v. *Sunray DX Oil Co.*, 391 U.S. 9 (1967); *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223 (1965). Significantly, the Supreme Court in *Sunray DX* acknowledged that its decision on the refundability of permanently certificated unconditional rates was at least "logically" inconsistent with the literal reading of Section 4(a) (391 U.S. at 36-37):

> Since the Natural Gas Act nowhere refers to "in-line" prices, the "excessive rates" referred to must be rates in excess of the just and reasonable rate at which § 4(a) comands that all gas must move. *Logically*, this would seem to imply that "to assure the "complete, permanent and effective bond of protection" referred to, any rate permitted to be charged during the interim period before a just and reasonable rate can be determined must be accompanied by a condition rendering the producer liable for refunds down to the just and reasonable rate, should that rate prove lower than the initial rate specified in the certificate.
>
> *Despite this apparent logic*, the Commission seems never to have imposed a refund condition of this type * * *. The Courts seem never to have suggested that the Commission impose such conditions.
>
> * * * *
>
> We cannot say, therefore, that the Commission breached any duty in failing expressly to consider whether the prices as fixed were suitable when regarded as refund floors. [Emphasis supplied.]

Like the Supreme Court in *Sunray DX*, we have declined to read Section 4(a) so literally as to defeat Congressional intent in Section 7(c) of the Act. Since April 15, 1971, we have maintained an emergency procedure whereby limited term certificates may be issued under Section 7(c) upon a finding that such is required by the present and future public convenience and necessity.[20] With full knowledge that limited term certificates do not contemplate present or future review under Section 4(a) of the Act, no party has ever contested the legality of that procedure. Furthermore, since May 6, 1970, we have exempted 60 day emergency purchases under Section 7(c) with full knowledge that no direct review would be made of producer rates during the exempted period under the standards of Section 4 of the Act.[21] Again, no party has ever attacked the legality of 60 day emergency purchases.

Since Section 4(a) has never been interpreted by this Commission or a court to invalidate either emergency purchases of 60 days or permanent certificates of both limited and unlimited duration issued under Section 7 of the Act, we fail to see how it can now be construed to prohibit an exemption period of 180 days to meet the present emergency. This does not mean, however, that consumers will be denied the rate protection to which they are entitled under the

[20] Order No. 431, 45 FPC 570 (1971).

[21] Order Nos. 402 and 402-A, 43 FPC 707 (1970), 43 FPC 822 (1970); Order No. 418, 44 FPC 1574 (1970).

Act. As we indicated in Order No. 491-A (*mimeo* at 8), we will scrutinize the rates of all emergency purchases in the review of purchased gas costs in pipeline rate proceedings, including purchased gas[21a] adjustment clause increases. We will permit the pipeline to pass on to the consumer the rates of emergency purchases *only* when such rates can be shown to have been required by the public interest. Moreover, we intend to monitor closely the volumes and prices which are to be reported to us for all emergency sales. Such monitoring will provide additional consumer protection in two major respects. First, it will permit us to evaluate continuously the efficacy of the 180 day exemption procedure. Should it appear that the public interest is not being served, we can, of course, eliminate the procedure. Secondly, through continuous monitoring, we will be able to initiate such action as may be required with respect to specific sales which appear to be inconsistent with the public interest.

Review of the rates of emergency purchases at the pipeline level is, in our judgment, an appropriate exercise of discretion which finds support in *Sunray DX*. In that case, the Supreme Court made it clear that while the Commission has a statutory responsibility to assure that gas will not be devoted to wasteful end uses, that responsibility can be fulfilled in pipeline proceedings, rather than producer certificate

[21a] Order No. 452 (April 14, 1972), Order No. 452-A (June 13, 1972), and Order No. 452-B (January 8, 1973).

proceedings. Significantly, the Court noted (391 U.S. 9, 51):

> Of course, our approval of the Commission's decision to deal with the need question in pipeline proceedings does not imply that the Commission may neglect its statutory duty to assure that sales of gas are required by the public "necessity." This statutory obligation implies that when interested parties assert that the Commission has permitted or is about to permit the sale of significant quantities of unneeded gas, then the Commission must supply an adequate forum in which to hear their contentions. We hold only that, so far as appears from the record before us, *pipeline proceedings can serve as such a forum.* If subsequent events should demonstrate that existing pipeline proceedings are inadequate, then the Commission must provide new arenas for objection. [Emphasis supplied.]

Thus, the Supreme Court has recognized that pipeline proceedings are sufficient to protect the consumer against wasteful uses of gas. In a similar manner, pipeline proceedings may be used to assure the consumer of rate protection insofar as emergency purchases are concerned.

Should we determine in a pipeline rate case that any emergency purchase was improvidently consummated at a rate which was more than necessary to secure the gas for the interstate market, we will not require refunds by the producer. Our reasoning for this decision is twofold. First, by exposing producers to such continued rate uncertainty, we would surely

discourage dedications to the interstate market. Secondly, we think that pipelines should continue to carry the burden of showing that all costs, including purchased gas costs, are reasonably incurred. Cf. *F.P.C.* v. *Hope Natural Gas Company*, 320 U.S. 591 (1944). This procedure, in our judgment, is unquestionably sufficient to afford "protection of consumers against exploitation at the hands of natural-gas companies." *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 685 (1954).

In adopting an exemption period of 180 days, we categorically reject the notion of some that another step has been taken toward "skyrocketing" prices. During recent years, the Commission has maintained natural gas prices at the lowest level consistent with adequate service. Data available from the Bureau of Labor Statistics reflects that price increases in natural gas have lagged behind the wholesale price index.[22] Moreover, data on file with the Commission demonstrates that the price paid by electric utilities for natural gas is less than one-half of the price paid for low sulfur residual #6 oil, about one-third of the price paid for distillate oil, and about three-fourths of that received for coal.[23] With the exception of certain cities along the East Coast, *i.e.* Boston, New York, and Philadelphia, the price of natural gas for residential heating is less than that for No. 2 fuel oil.[24]

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[22] Appendix A.

[23] Appendix B.

[24] Appendix C.

The low price which consumers pay for natural gas is understandable when one considers that during the period from 1964 to 1972, the average price paid at the wellhead for natural gas by major interstate pipelines increased from 16.59 cents per Mcf to 20.54 cents per Mcf, an increase of about 24 percent.[25] During the same period, the Consumer Price Index Index increased 35 percent.

Finally, in a study prepared by the Commission's Office of Economics for the Chairman's use in testimony presented to the Senate Commerce Committee on October 11, 1973, it was determined that:

> * * * in terms of 1972 dollars, the 1963 average price paid by major pipelines to domestic producers for gas at the wellhead was 22.6 cents per Mcf. Inasmuch as the actual price in 1972 was 20.5 cents per Mcf, that study indicated that the average wellhead "constant dollar" price, for volumes sold to major jurisdictional pipelines, *declined* by 2.1 cents, or about 10 percent, during the 1963-1972 period. [Emphasis in original.][26]

There is no reason for believing that the 180 day exemption procedure will limit our ability to continue to hold prices down for the consumer. Indeed, experience gained from the 60 day exemption program squarely refutes any contention to the con-

[25] Appendix D.

[26] See Statement of John N. Nassikas, Chairman, Federal Power Commission, Before the Committee on Commerce, United States Senate, October 11, 1973, p. 17.

trary. During the 1972 calendar year, twelve pipelines in curtailment and making emergency purchases secured a total of 8,938,259 MMcf of gas from producers, of which 128,230 MMcf were purchased under the 60 day emergency purchases procedure at a weighted average price of 34.5¢ per Mcf. The total rate impact of the emergency purchases on the weighted average price of the pipelines proved to be approximately 0.19¢ per Mcf, with a range of from 0 to 0.47¢ per Mcf.[27] Considering the value of the emergency purchases program in 1972, in averting deeper curtailments we cannot say that an impact of less than 2 mills imposed an unreasonable burden on the consumer.[27a]

III. *Limited Term Certificates.*

With few exceptions, each commenting party recommends that the Commission reinstate the limited term certificate procedure which was stayed by Order No. 491. While we remain firm in our belief that the solution to the gas supply crisis must be

[27] Estimated by the Commission's Bureau of Natural Gas using data reported by pipelines in their Form 2 reports and data reported pursuant to Commission Orders Nos. 402 and 418.

[27a] During the same 1972 calendar year, of the total of 8,938,259 MMcf purchased from independent producers by pipelines in curtailment and making emergency purchases, 240,710 MMcf of gas was purchased under limited term certificates at a weighted average price of 34.08 cents per Mcf. The total rate impact of limited term certificates *plus* 60 day emergency purchases was only 6 mills, approximately.

based on long-term dedications of gas under the area rate or optional certification procedures, we also recognize the merit in a plan that has proven its utility in providing large volumes of gas to the interstate market, albeit for a relatively short period of time. Moreover, we agree with many of those filing comments [28] that a tested and unassailed alternate procedure should be available in the light of the uncertainty which has been created by the court's stay of Order No. 491. With the D.C. Circuit's reversal of *Texas Gulf Coast Area Natural Gas Rate Case*, —— F.2d —— (D.C. Cir. No. 71-1828) and the pending review of the optional certification procedure in *John E. Moss* v. *F.P.C.*, D.C. Cir. Nos. 72-1837, *et al.*, the limited term certificate procedure is the only procedure currently unclouded by legal uncertainty.[29] Accordingly, we will continue the availability of all procedures set forth in Order No. 431.

We cannot agree, however, with the position of some commenting parties that retention of the limited term certificate procedure obviates the need for extending the emergency exemption period to 180 days. Our present order is responsive to the immediate supply shortage now facing many interstate pipelines for the four to six month 1973-74 winter heating season. Because of the administrative delay in-

[28] Comments of Exxon Corporation, p. 3; Comments of Tenneco, p. 2; Comments of Shell Oil Company, p. 3.

[29] Limited term certificates were held lawful in *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 239 F.2d 97 (10th Cir. 1956), reversed on other grounds, 353 U.S. 944 (1957).

herent, in the review of limited term certificate applications, this procedure is insufficient to cope with the present emergency.

Conclusion

We would be remiss if, in closing, we did not respond to the rhetorical indictment by Senators Humphrey, *et al.*,[30] that this Commission is guilty of "administrative abandonment of the consumer protection provided by Congress." We have not abandoned any of our responsibilities under the Natural Gas Act, nor do we intend to do so in the future. True, we have exempted certain temporary sales from direct regulation, in order to meet an emergency, but we have done so *only* in accordance with Congressionally delegated power explicitly defined in Section 7(c).

There are those who regard the Commission as impotent, in the absence of further Congressional action, to deal with the gas supply crisis now plaguing the American consumer. To these, we are a sterile body with no more responsibility than to insure that rates are held to a minimum. We view our duties more broadly, as did Congress, in our judgment. The consumer is entitled to our assurance of adequate service as well as low rates; indeed, the question of price is academic if supply is not forthcoming. If Order No. 491 is permitted to remain

[30] Comments, p. 7.

viable, it will contribute greatly to complete consumer protection for the present winter.

The Commission finds:

Upon review and analysis of the comments, and considering data and information described herein which is matter of public record, it is in the public interest that we take all action hereafter ordered.

The Commission orders:

(A) Part 2, Subchapter A, General Rules, Chapter I of Title 18 of the Code of Federal Regulations, is amended by revising the following:

§ 2.68(a) and (b)—The 60-day periods found therein are changed to 180 days.

§ 2.70(b)(3)—The 60-day periods found therein are changed to 180 days.

(B) Section 157.22, Subchapter E, Chapter I, Title 18 of the Code of Federal Regulations, is amended by revising the following:

§ 157.22(a)—The 60-day period is changed to 180 days.

(d)—The 60-day period is changed to 180 days.

(C) Section 159.29, Subchapter E, Chapter I, Title 18 of the Code of Federal Regulations, is amended by revising the following:

§ 157.29(a)—The 60-day period is changed to 180 days.

(b)—The 60-day period is changed to 180 days.

(D) Order No. 491 is modified to eliminate that portion of ordering paragraph (A) which stayed the limited term certificate procedure.

(E) All applications for rehearing are treated as motions for reconsideration and as such are denied.

(F) The revisions and amendments in (A), (B), and (C) are effective upon issuance and until March 15, 1974.

By the Commission.

[SEAL]

Kenneth F. Plumb,
Secretary.

APPENDIX A

Wholesale Price Index and Component Indexes for Fuels
(1967=100)*

	Year	All Commodities	Fuel and Power	Natural Gas	Residual Fuel Oil	Diesel Fuel and No. 2	Bituminous Coal
	1967	100.0	100.0	100.0	100.0	100.0	100.0
	1968	102.5	98.9	101.6	95.7	101.9	103.1
	1969	106.5	100.9	103.0	93.3	102.4	112.7
	1970	110.4	106.2	105.6	125.5	106.5	152.9
	1971	114.0	114.2	112.2	166.0	110.0	187.2
	1972	119.1	118.6	121.0	158.8	111.3	199.2
Aug.	1973	142.7	142.9	133.3	191.8	154.1	221.5

* Based upon data available from U.S. Department of Labor, Bureau of Labor Statistics, Wholesale Price Index, issued monthly.

APPENDIX B

1972-1973 Fossil Fuel Purchases by Electric Utility Steam Plants
(Price in cents per Million Btu)

	Percent Sulfur Content	1972 Third Quarter	1972 Fourth Quarter	1973 First Quarter
Coal	less than 1	38.17	38.76	40.10
	1.01 to 3	38.74	38.70	40.44
	3.01 or more	33.98	34.60	35.49
No. 6 Oil	less than 5	68.15	70.53	76.57
	.51 to 2	55.09	55.98	61.09
	2.01 or more	40.42	44.22	46.16
Distillate Oil	less than .1	81.97	85.67	94.11
Natural Gas		31.06	30.31	31.21

Source: FPC Form No. 423

APPENDIX C

Prices of Gas and No. 2 Fuel Oil for Residential Heating in Representative Cities, 1970-73 [1]
($ Per Million Btu)

Standard Metropolitan Statistical Areas	December 1970		December 1971		December 1972		March 1973		June 1973	
	Gas	Fuel Oil	Gas	Fuel Oil	Gas	Fuel Oil	Gas	Fuel Oil	Gas	Fuel Oil
Atlanta	0.82	—	1.01	—	1.01	—	1.11	—	1.12	—
Baltimore	1.31	1.37	1.51	1.39	1.55	1.39	1.50	1.48	1.47	1.54
Boston	1.57	1.42	1.80	1.48	1.89	1.47	1.85	1.60	1.92	1.72
Buffalo	1.03	1.50	1.22	1.52	1.27	1.56	1.21	1.65	1.24	1.72
Chicago-N.W. Indiana	0.98	1.31	1.05	1.33	1.10	1.35	1.13	1.46	1.12	1.48
Cincinnati	0.81	—	0.92	—	0.98	—	0.95	—	0.96	—
Cleveland	0.85	—	0.88	—	0.94	—	0.94	—	0.95	—
Dallas	0.85	—	0.86	—	0.89	—	0.89	—	0.89	—
Detroit	0.87	1.34	0.94	1.34	0.99	1.35	1.00	1.48	1.01	1.47
Houston	0.93	—	0.93	—	0.99	—	1.01	—	0.67	—
Kansas City	0.68	—	0.72	—	0.72	—	0.75	—	0.74	—
Milwaukee	1.26	1.38	1.35	1.36	1.39	1.37	1.39	1.47	1.40	1.58
Minneapolis-St. Paul	0.90	1.29	0.99	1.31	1.05	1.31	1.12	1.40	1.12	1.45
New York-N.E. New Jersey*	1.38	1.37	1.60	1.47	1.66*	1.47	1.67	1.57	1.78	1.64
Philadelphia	1.43	1.38	1.37	1.36	1.53	1.39	1.62	1.48	1.63	1.57
Pittsburgh	0.96	—	1.01	—	1.08	—	1.06	—	1.06	—
St. Louis	0.97	1.34	1.08	13.9	1.08	1.41	1.15	1.49	1.10	1.56
San Francisco-Oakland	0.70	—	0.76	—	0.77	—	0.84	—	0.85	—
Seattle	1.16	1.56	1.24	1.59	1.27	1.60	1.27	1.66	1.29	1.70
Washington, D. C.	1.35	1.38	1.50	1.42	1.57	1.43	1.55	1.54	1.56	1.59

* The burner tip price of $1.66 per million Btu in New York City in December 1972 is allocated as follows: 78% to the distributor, 12 percent to the pipeline company, and 10 percent to the producer.

[1] Prices include all applicable taxes. Gas price is based on average per therm above 40 therms per month. Fuel oil price is based on price paid for 100 gallons of No. 2 oil.

Source: Retail Prices and Indexes of Fuels and Electricity, June 1973, Table 7, p. 6. (Bureau of Labor Statistics)

APPENDIX D

Average Prices Paid and Received
by Major Interstate Pipelines
(Cents per Mcf)

Year	Price Paid at Wellhead	Price Received at City Gate
1964	16.59	37.14
1965	16.71	36.59
1966	16.87	36.08
1967	17.13	35.60
1968	17.32	35.33
1969	17.62	36.39
1970	18.11	38.56
1971	19.23	42.33
1972	20.54	46.17
1973 (12 months ending July)	21.53	47.94

APPENDIX F

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., and William L. Springer.

Docket No. RM74-3

Policy with Respect to Establishment of Measures to be Taken for the Protection of Reliable and Adequate Service for the 1973-1974 Winter Heating System

ORDER NO 491-C

ORDER DENYING REHEARING AND STAY

(Issued November 21, 1973)

In Order No. 491-B, issued November 2, 1973, we reaffirmed our extension of the term under which a pipeline experiencing a shortage on its system could make emergency purchases of natural gas without Commission certification, from 60 to 180 days. In addition, Order No. 491-B reinstated the provisions for issuance of limited term certificates with pregranted abandonment. On November 6, 1973, Consumer Federation of America, the American Public Gas Association, the American Public Power Association, and the National League of Cities—United States Conference of Mayors (hereinafter denominated "Con-

sumer Federation") filed a joint application for rehearing and stay of Order No. 491-B.

Having review the application, we conclude that no argument has been presented which was not considered in previous orders in this docket, and that, accordingly, rehearing should be denied. Moreover, applicants have failed to demonstrate that a stay of Order No. 491 is appropriate in the light of the standards enunciated in *Virginia Petroleum Jobbers Association* v. *F.P.C.*, 104 U.S.App.D.C. 106, 259 F.2d 921 (1958). Utilizing those standards, a stay is not proper unless (1) petitioner has made a strong showing that it is likely to prevail on the merits of its appeal, (2) petitioner has shown that it will be irreparably injured without such relief, (3) the issuance of a stay would not substantially harm other parties interested in the proceeding, and (4) a stay is required by the public interest.

With regard to the first of these criteria, we are convinced that our extension of the exemption period from 60 to 180 days is both legal and required by the public interest. Accordingly, we deem it highly unlikely that Consumer Federation will prevail on the merits of their appeal now pending *sub nom. Consumer Federation of America, et al.* v. *F.P.C.*, D.C. Cir. No. 73-2009. In view of our discussion of the law in Order No. 491-B (*mimeo* at 10-17, 19), it is unnecessary to provide a lengthy refutation of Consumer Federation's argument that we are deregulating in defiance of our statutory mandate. It will suffice to state that we have acted only in accordance

with our explicit authority under Section 7(c) of the Natural Gas Act to exempt "temporary acts or operations for which the issuance of a certificate will not be required in the public interest". 15 U.S.C. § 717f(c). An exemption of 180 days is unquestionably temporary and, as more fully discussed in Order No. 491-B (mimeo at 4-9), it is most certainly required by the public interest to meet the pending crisis this winter.

The second and third criteria of *Virginia Petroleum Jobbers* require us to consider the harm that would result to Consumer Federation in the absence of a stay, as compared with the harm which would result to other parties from a grant of a stay. Once again, we think that Consumer Federation's showing is insufficient. Consumer Federation's fear of uncontrolled price increases is basically unfounded. As stated in Order No. 491-B (*mimeo* at 13):

> * * * we will scrutinize the rates of all emergency purchases in the review of purchased gas costs in pipeline rate proceedings, including purchased gas [footnote omitted] adjustment clause increases. We will permit the pipeline to pass on to the consumer the rates of emergency purchases *only* when such rates can be shown to have been required by the public interest. Moreover, we intend to monitor closely the volumes and prices which are to be reported to us for all emergency sales. Such monitoring will provide additional consumer protection in two major respects. First, it will permit us to evaluate continuously the efficacy of the 180 day exemption

procedure. Should it appear that the public interest is not being served, we can, of course, eliminate the procedure. Secondly, through continuous monitoring, we will be able to initiate such action as may be required with respect to specific sales which appear to be inconsistent with the public interest.

Through these procedures, we will be able to afford the consumer complete rate protection and, thus, prevent the irreparable injury which Consumer Federation alleges. While no irreparable injury will result to the Consumer Federation from a denial of the stay, it is clear that the nation's consumers will be severely harmed if the exemption is not permitted to operate for the present winter, during which period the level of curtailment is projected to be .5 trillion cubic feet. As we noted in Order No. 491 (*mimeo* at 4), such curtailments will result in "severe economic and environmental consequences, resulting in the closing of schools and factories, the denial of utility service to new customers, the utilization by industry and electric utilities of alternate fuels which impact upon ambient air quality standards, and the transfer of unfulfilled demand to other fuels in short supply with the resultant upward price pressures". Given these circumstances, we believe that affirmative remedial action, such as a temporary exemption from the requirements of Section 7, is mandated.

In view of the foregoing and our discussion in Order No. 491-B (*mimeo* at 4-9), it is clear that Consumer Federation cannot demonstrate that a stay is

required by the "public interest", the fourth criterion of *Virginia Petroleum Jobbers*. To the contrary, the public interest dictates that the application for stay be denied. If the American consumer is to be protected with an adequate and reliable supply of gas during the next few months, new deliveries under the emergency purchases exemption must commence immediately.

The Commission finds:

Consumer Federation's application for rehearing and stay presents no facts or principles which would warrant any change or modification of Order No. 491-B. Additionally, Consumer Federation has failed to demonstrate that the issuance of a stay would be in the public interest.

The Commission orders:

Consumer Federation's application for rehearing and stay is denied.

By the Commission.

[SEAL]

KENNETH F. PLUMB,
Secretary.

APPENDIX G

The Natural Gas Act, 52 Stat. 821, *et seq.*, as amended, 15 U.S.C. 717, *et seq.*, provides in pertinent part:

Section 4, 15 U.S.C. 717c:

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as

the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon rea-

sonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate

or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 5, 15 U.S.C. 717d:

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a

decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

Section 7, 15 U.S.C. 717f:

CONSTRUCTION, EXTENSION, OR ABANDONMENT OF FACILITIES; CERTIFICATE OF CONVENIENCE AND NECESSITY; CONDEMNATION PROCEEDINGS

(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed

upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route

or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon

such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the

Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

Section 16, 15 U.S.C. 717*o*:

ADMINISTRATIVE POWERS OF COMMISSION; RULES, REGULATIONS, AND ORDERS

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-227

FEDERAL POWER COMMISSION, *Petitioner*

v.

CONSUMER FEDERATION OF AMERICA, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

AMICUS CURIAE BRIEF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN CONDITIONAL SUPPORT

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AMICUS CURIAE BRIEF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN CONDITIONAL SUPPORT

The Interstate Natural Gas Association of America (INGAA), having obtained the consent of all parties pursuant to Rule 42 of this Court, hereby submits this brief as *amicus curiae* in conditional support of Petitioner.

THE AMICUS

INGAA is a non-profit association whose members include most of the major interstate natural gas transmission companies subject to the jurisdiction of the Federal Power Commission (Commission) under the Natural Gas Act, 15 U.S.C. § 717, *et seq.* (Act). Their operations account for more than 90% of the natural gas transported and sold annually in interstate commerce in the United States. INGAA has participated as an intervenor or *amicus curiae* before this Court and various U.S. Courts of Appeal in matters relating to Commission decisions. The instant petition presents issues of industry-wide significance in which INGAA's members are vitally concerned.

THE INTEREST OF AMICUS

The instant proceeding involves the question of the authority of the Commission to exempt 180 day emergency sales of natural gas to interstate pipeline companies from rate and certificate regulation. Order No. 491 extended, from 60 days to 180 days, the period of time that a pipeline experiencing a supply deficiency could make emergency purchases of gas without Commission certification under Section 7(c) of the Act. The Commission devised the emergency regulations to ameliorate the severe pipeline curtailments anticipated for the 1973-1974 winter heating season. Subsequently, in Order No. 491-A, the Commission proposed to *indirectly* regulate such "exempt" sales by reviewing the rates for emergency sales in pipeline rate proceedings.

Interstate pipelines, and their respective customers, are presently confronted with gas deficiencies affecting high-priority markets far more drastic than in September 1973 when Order No. 491 was issued. The pervasive natural gas shortage has resulted in numerous industrial plant closures throughout the nation. The FPC Staff recently released a gas curtailment report projecting that shortfalls for the April 1975 through March 1976 period will be 45% greater than the curtailments actually incurred during the preceding twelve months.[1] It is apparent that INGAA is deeply interested in Commission measures designed to alleviate current and future pipeline curtailments.

ARGUMENT

INGAA fully supports the position and arguments set forth in the Brief in Conditional Support filed in this proceeding on September 11, 1975, by Texas Gas Transmission Corporation (Texas Gas) and Transcontinental Gas Pipe Line Corporation (Transco), both of whom are active members of INGAA. INGAA submits that the exemption proviso in Section 7(c) of the Natural Gas Act provides sufficient statutory authorization for the promulgation by the Commission of its emergency regulations. The Commission cannot be rendered helpless at a time when interstate pipelines are being forced to severely curtail their high-priority customers. The sales encompassed by the emergency provisions are short-term in nature and, thus, the exercise of Commission rate and certificate jurisdiction with respect to such transactions, as directed by the court below, is not only legally unnecessary but would also preclude the acquisition of additional gas supplies for the interstate market.

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[1] FPC Staff Gas Curtailment Report, June, 1975.

Consistent with the Act's requirement that adequate service to interstate consumers has to be maintained, the rates for emergency sales must be reviewed on the basis of the "prevailing market price." The Commission has repeatedly acknowledged that its emergency regulations were designed to allow interstate pipelines to compete with intrastate purchasers for onshore reserves *not otherwise available to the interstate market.* The introduction of other variables, such as producer costs, etc. (see Brief of Texas Gas and Transco, *supra,* pp. 15-17), into the Commission's proposed indirect rate regulation at the pipeline level is unwarranted. This Court has even recognized that in certain situations "the market price of gas would . . . coincide with just and reasonable rates." *FPC* v. *Texaco,* 417 U.S. 380, 399 (1974). Furthermore, given the risk of substantial refund liability, the utilization of any tests other than the prevailing market price standard will effectively preclude producers and pipelines from entering into emergency sales contracts. The whole purpose of the emergency provisions will have been thwarted and virtually all onshore supplies will continue to be sold in the unregulated intrastate market.

Finally, it should be obvious to this Court that Order No. 491 did not establish adequate standards to guide interstate pipelines in making emergency purchases. See *Texaco, supra.* As the court of appeals below stated:

> "In *Texaco* the Court was concerned with the *squeeze on the pipelines* which stemmed from making payments that would be both disallowed and nonrefundable, and made it clear that any such program would require *'guidance'* for those that

> might be affected. [footnote omitted] *The warning in Order 491 against 'improvident' contracts does not provide adequate guidance to protect the pipelines."* (Emphasis added.) (FPC Pet., p. 26a)

The Commission, therefore, should be prohibited from refusing to permit pipelines to collect in their costs of service the full amounts paid to producers in connection with emergency sales consummated pursuant to Order No. 491.

Respectfully submitted,

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I.

INTRODUCTORY STATEMENT

A. Statement of Position and Interest of Amicus Curiae

This brief *amicus curiae* is filed by the American Gas Association ("A.G.A."), pursuant to Rule 42(1) of the

Rules of the Supreme Court of the United States, in support of Solicitor General's Petition for a Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Decision in *Consumer Federation of America et al. v. Federal Power Commission*, 515 F.2d 347, decided March 13, 1975. All parties to this action have consented to the filing of this brief.

A.G.A. is a non-stock, non-profit corporation incorporated under the laws of the State of Delaware. It is the national trade association for approximately 300 natural gas distribution and transmission companies serving customers in all 50 states. These companies serve nearly 90 percent of the natural gas customers in this country. Natural gas provides about one-third of our nation's total energy requirements and, when energy for transportation is excluded, more than 60 percent of the energy requirements for industry in the United States. The 900,000-mile pipeline network is the most efficient and economical energy delivery system presently available or foreseeable. This national network of pipes and mains, representing a total investment of some 50 billion dollars, serves some 160 million of our population.

Natural gas is the most efficient form of energy available in the United States for appropriate residential uses, according to the President's Council on Environmental Quality. It is also the least polluting fuel available, a fact which places it in great demand by industries concerned with achieving air quality standards; further, its burning characteristics make it irreplaceable for many industrial processes. Finally it is, and will continue to be one of our least expensive fuel resources because of the capital efficiency of the gas industry itself, as well as its transportation and

combustion efficiencies. It is, in short, a premium fuel for which great demands exist.

The Federal Power Commission (FPC) itself, in the instant proceeding, in a multitude of other cases prior to this case, and in other proceedings and reports since 1973 has recognized the existence of the supply deliverability problem, and the fact that the interstate consumer in particular has been placed at a severe disadvantage in competing for available gas supplies by the lack of pricing restraints upon intrastate customers in the producing states. It has adopted a variety of measures to deal with this problem, ranging from revision of pipeline tariffs to specify the rights and priorities of pipelines and their customers in curtailed supply situations, to the measures here at issue, designed to permit interstate consumers to compete on more equal footing for gas supplies available in the intrastate market.

At the present time, it is clear that demand for natural gas far exceeds the supplies dedicated to the interstate pipelines. Failure to remedy this situation could jeopardize the more than $30 billion of unamortized assets of the industry, as well as ultimately possibly rendering useless the multi-billion dollar investment of consumers in gas appliances and equipment. Since 1968, A.G.A. has been expressing publicly a concern about declining supply. In 1970, interstate pipelines for the first time were required to curtail contracted-for deliveries, and these curtailments reached a level of 13.58 percent in 1974.

The validity of FPC determinations of gas supply shortages is not here at issue, but is well documented by the findings and reports of other federal agencies of which this Court may take judicial notice. For example,

in 1974, according to the Federal Energy Administration, natural gas production declined for the first time, to 21.2 trillion cubic feet (Tcf), or almost 6 percent from the 1973 level of 22.5 Tcf. This is equivalent to over 230 million barrels of crude oil. The greatest impact will be on industry, especially fertilizer, food, glass, fiberglass, electric components and electric equipment, aluminum refractories and kilns, bearings, steel rolling mills and plastics. Consumers will feel the impact of the shortages in the form of higher prices charged them for goods and services produced using more costly petroleum fuels.

While the impact of the natural gas shortage will be minimized by the availability of Alaska and outer continental shelf reserves, the exploration, production, and distribution problems inherent in developing those reserves are substantial and will forestall delivery for a significant period of time.

The Federal Energy Administration reports that the nation's network of interstate gas pipelines will be short 1.3 Tcf of the 9.0 Tcf of gas needed for the November 1975 to March 1976 winter heating season or a shortage 30 percent greater than the nation endured last winter. On an annual basis, it has also been predicted that the nation will be short 2.9 Tcf of the approximately 20 Tcf it will need. This constitutes a cutback which is 45 percent worse than endured in 1974. See Federal Energy Administration, The Natural Gas Shortage: A Preliminary Report, August 28, 1975, at 3.

In the meantime, the shortage of natural gas will cause plant closures and loss of jobs in affected parts of the country and will generally contribute to adverse economic conditions. Ten or twelve states face severe

curtailments this winter. These include the mid-Atlantic states stretching from New York to South Carolina and several midwestern states, such as Ohio, West Virginia and Kentucky. Curtailments in these areas are primarily due to cutbacks by five interstate pipelines.[1] For example, United Gas Pipeline Co., Texas Eastern and TRANSCO incurred, respectively, 41.42 percent, 21.45 percent, and 27.70 percent curtailment of firm requirements for the year April 1974 - March 1975 and will incur a projected deficiency of 47.65 percent, 25.72 percent, and 40.53 percent, respectively, for the year April 1975 - March 1976. See FPC Press Release 21454, June 6, 1975, at Schedule I. Further, it is expected that these shortages will increase in the next few years.

The legislative and executive branches as well as cognizant administrative agencies, of states and the federal government are groping for long term solutions to the nation's natural gas crisis. There is no single answer. Regulatory innovation, such as at issue in *Consumer Federation*, and indeed pragmatic experimentation will be required to develop requisite curative devices.

B. Statement of the Case

The present case arises from Federal Power Commission Order No. 491, issued September 14, 1973,

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[1] Representing, according to FEA statistics, nearly 80% of the volume of projected curtailments are Columbia Gas Transmission Corp., El Paso Natural Gas Co., Texas Eastern Transmission Co., United Gas Pipeline Co., and Transcontinental Gas Pipeline Corp. (TRANSCO). FEA Preliminary Report, at 4.

which attempted to deal with projected gas shortages during the 1973-74 heating season. Order No. 491 extended from 60 to 180 days the exemption from the certification requirement of Section 7 of the Natural Gas Act of 1938 (the "Act") permitting short-term emergency sales of natural gas at prices above FPC area rates to pipelines experiencing or facing gas shortages or curtailments of service. The Commission indicated, however, that any such pipeline purchases would be subject to review under Sections 4 and 5 of the Act. After many procedural steps (set forth in the Solicitor General's petition), the order was finalized on November 2, 1973. Thereafter an appeal was taken to the Court of Appeals, which set aside Order No. 491 after which the instant Petition for Writ of Certiorari was filed. The Court of Appeals concluded that the FPC lacked the authority to promulgate Order No. 491 because the Section 7(c) exemption in the Act was never intended to include large, widespread deliveries of gas for up to 180 days without hearings and also because it violated the just and reasonable rate standard of Sections 4 and 5 of the Act.

II.

THE DECISION OF THE COURT OF APPEALS SHOULD BE REVIEWED UNDER A WRIT OF CERTIORARI FOR PURPOSES OF DECIDING THE IMPORTANT QUESTION OF THE AUTHORITY OF THE FEDERAL POWER COMMISSION TO DEAL WITH EMERGENCY SHORTAGES OF INTERSTATE PIPELINE GAS SUPPLIES.

A.G.A. believes that the Commission has the authority under Section 7(c) of the Act to exempt pricing of emergency gas sales from the normal certification requirements of Section 7, and that 180 days is not an unreasonable time for the FPC, in its discretion, to select and, with the exception noted below, the Commission properly exercised its discretion in the instant proceeding. In a period of grave national emergency, administrative agencies charged with responsibility for an area of national concern should be granted reasonable latitude to deal with the subjects of their expertise. It is most urgent, in view of the increasing shortages of natural gas since Order No. 491 was first promulgated, that this Court define this emergency authority under Section 7(c) of the Act to enable the FPC to deal with such matters.

On the other hand, it should be pointed out that one consequence of Order No. 491 is to cause the pipelines to assume the risk that the Commission in subsequent Section 4 or 5 proceedings might consider the price paid for these emergency purchases to be unjust or unreasonable. A.G.A. believes that this consequence is counterproductive, as a pipeline, even if faced with cur-

tailments will not be likely to buy gas that may be available at a premium if it runs the risk that it will not be able to recover its cost for such purchased gas.

III.

CONCLUSION

For the reasons set forth above, A.G.A., on behalf of its pipeline and distribution company members serving the public, respectfully submits that the Petition for a Writ of Certiorari to U.S. Court of Appeals for the District of Columbia Circuit should be granted and that the decision of the Court of Appeals should be reviewed by this Court.

Respectfully submitted,

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Dated: September 10, 1975

No. 75-227

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL POWER COMMISSION,
Petitioner,

v.

CONSUMER FEDERATION OF AMERICA, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Consumer Federation of America, American Public Gas Association, American Public Power Association and National League of Cities—United States Conference of Mayors, joint petitioners before the United States Court of Appeals for the District of Columbia Circuit, hereby file this brief in opposition to the petition of the Solicitor General on behalf of the Federal Power Commission ("FPC" or "Commission") for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. For the purposes of this brief in opposition, we adopt the introductory sections of the petition for a writ except for the section entitled "Question Presented" which should be stated as follows:

Whether the Federal Power Commission has authority under the limited proviso of Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), to exempt from normal certification requirements 180 day sales of natural gas to pipelines, when the prices of such sales from producer to pipeline will not be reviewed by the Commission at all and the inclusion of such prices in the pipeline's rates will be reviewed under a lesser and more uncertain standard than the "just and reasonable" requirement of Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c and d.

REASONS FOR DENYING THE WRIT

The Federal Power Commission in Order Nos. 491, 491-A, 491-B, and 491-C amended its regulations without a hearing to permit producers to make sales to pipelines for 180 days without the need to obtain a certificate, with no limit as to the price which the producers could exact from the pipelines and without any possible refund liability by producers for excessive rates received. The Commission purported to take this action under the limited exemption portion of the proviso to Section 7(c) of the Natural Gas Act, which Section provides:

> "*No natural-gas company* or person which will be a natural-gas company upon completion of any proposed construction or extension *shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission*, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, *unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity* issued by the Commission authorizing such acts or operations: . . . .
>
> * * * *

> "In all other cases the *Commission shall set the matter for hearing* and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however, That the Commission* may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and *may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.*" [Emphasis supplied.]

The FPC's 180-day deregulation amendment expired by its own terms on March 15, 1974, the end of the winter heating season, and was not renewed during the following winter of 1974-75; however, because of the possibility that the producers which sold this gas could be required to refund to the pipelines and the consumers all amounts paid in excess of the just and reasonable area rate, the United States Court of Appeals for the District of Columbia Circuit found the question of this amendment's legality not to be moot, and held that the action taken by the Commission in the Order No. 491 series was unlawful and set these orders aside.

1. The Commission's allowance of 180 day noncertificated producer sales was unlawful for a number of reasons, the most important of which is that it constituted deregulation of producer sales to pipelines. The Commission specifically stated in Order No. 491-B that

> "Should we determine in a pipeline rate case that any emergency purchase was improvidently consummated at a rate which was more than necessary

> to secure the gas for the interstate market, *we will not require refunds by the producer.*" [App. E at 92a (emphasis supplied).[1]]

Thus, even if the Commission did determine after the fact that the price charged by the producer pursuant to the Order 491 procedure was excessive, it promised to take no action to obtain the return of the admittedly excess profits received by the producer.

The Commission's only regulatory function concerning the prices charged under these 180 day sales would be to review the price paid by the pipeline when the pipeline attempts to pass this cost on to the consumer in a pipeline rate case. But, as the court of appeals held, this proposed procedure of performing all regulatory actions at the pipeline level is contrary to the teaching of this Court in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), and *Atlantic Refining Co.* v. *Public Service Comm'n (CATCO)*, 360 U.S. 378 (1959), that invocation of the FPC's authority to disallow "excessive" costs at the pipeline level is not an adequate justification for complete inaction at the level of producer prices. (*See* App. A at 23a.) This is so because a finding by the Commission that a pipeline may not pass through all purchased gas costs for these 180 day purchases is a finding that the sale by the producer to the pipeline was at an unjust and unreasonable rate. Yet, by specifically eliminating the possibility of producer refunds, the Commission is deliberately choosing to permit the producer to keep the windfall profits received by the sale to the pipeline at a rate above the just and reasonable level. This constitutes deregulation of producer rates and is unlawful under this Court's recent holding in *Federal Power Commission* v. *Texaco*, 417 U.S. 380, 401 (1974), that the Commission must

[1] References herein to appendices are to the appendices attached to petition of the FPC.

insure "that *the rates paid by pipelines*, and ultimately borne by the consumer, are just and reasonable." [Emphasis supplied.]

Thus, it is not enough that the FPC may not allow the pipeline to pass on to the consumer an unjust and unreasonable rate, but the Commission must also be certain the rates paid by the pipeline to the producer are just and reasonable, and this consideration has been specifically and explicitly eliminated by the Commission, contrary to this Court's mandate in *Texaco*, *supra* at 394, that:

> "Sections 4 and 5 of the Natural Gas Act require that all gas rates be just and reasonable; and the Court held in Phillips that this very prescription applies to the rates of all gas producers."

2. Compounding the unlawfulness of the Commission's attempt to satisfy the Natural Gas Act's requirement of producer regulation through the *post hoc* monitoring of pipeline charges of purchased gas costs to consumers, is the fact that the FPC's standard for reviewing the price of 180 day purchases is less than the "just and reasonable" requirement of Sections 4 and 5 of the Act. The stated purpose for the *de facto* deregulation of producer sales of 180 days duration was to attempt to attract supplies of gas to the interstate market which would otherwise be sold in the unregulated intrastate market in order to alleviate the deficiency in the supply of gas being placed on the interstate market during the 1973-74 winter heating season. (*See* App. C at 36a-38a.) [2] Order

[2] In light of this purpose, it should be noted that Order No. 491 applied to offshore gas in the Federal domain, as well as to onshore gas. Since offshore gas must be sold interstate, there was absolutely no justification for permitting 180 day producer sales at unregulated prices from the offshore area. The FPC has recognized this in its Order No. 533, issued August 28, 1975 in Docket No. RM75-25,

[Footnote continued]

No. 491 does not enumerate the standards which the FPC will utilize in determining if the price paid by the pipeline should be ultimately borne by the consumer and does not expressly mention the "just and reasonable" standard. The Commission utilized such expressions in Order No. 491-B as "will permit the pipeline to pass on to the consumer the rates of emergency purchases *only* when such rates can be shown to have been required by the public interest" (App. E at 91a; emphasis in original), and will not allow full recoupment by a pipeline of the price paid for purchases "improvidently consummated at a rate which was more than necessary to secure the gas for the interstate market" (App. E at 92a).

When these ambiguous statements are read together with the declared purpose of the 180 day sales, the only standard which is revealed to a pipeline considering whether to make a 180-day purchase is that if it is experiencing curtailment and a producer will not sell the gas to it at a lower price, then the price paid is "required by the public interest" and "necessary to secure the gas for the interstate market." This is not

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[2] [Continued]

wherein the Commission in issuing a statement of policy of questionable validity—one of the three sitting Commissioners declaring it patently unlawful—limited its action to onshore gas:

> "In proposing the policy statement we intended that it apply to the on-shore domain (whether federal or non-federal) and to the off-shore non-federal domain, *i.e.*, the only domain to which this statement of policy does not apply is the off-shore federal domain. We thought the reason for this restriction was apparent. One of the main goals of our statement of policy is to make gas otherwise sold only in the intrastate market available to the interstate market. The transportation or sale of gas from the off-shore federal domain is by definition transported or sold in interstate commerce. Since gas from the off-shore federal domain is therefore already available to the interstate market, we see no need for making the policy applicable to the off-shore federal domain." [Slip op. at 16.]

Consequently, Order No. 491 is also unlawful because its application is overly broad.

regulating rates at the just and reasonable level as required by Sections 4 and 5 of the Act because there is absolutely no account taken of the cost of the gas to guard against windfall profits, and the whole purpose of allowing a 180 day non-certificated sale is to *avoid* the just and reasonable ceiling established in the applicable area rate proceeding; this is simply allowing purchases at unregulated, whatever-the-market-will-bear prices.[3] Furthermore, the Commission, as the result of initiating regulation at the pipeline level after the payment of the unregulated rate by the pipeline to the producer, will naturally be more inclined to allow a pipeline to pass through the cost of 180 day gas since the pipeline has no recourse against the producer if the pass through to the consumer is not allowed.[4]

The present case is on all fours with the *Texaco* case, *supra*, in which this Court struck down a Commission attempt in Order No. 428 to deregulate small producer prices. In *Texaco*, the FPC determined that rates would no longer be directly regulated, but would be subjected only to indirect regulation through the review of purchased gas costs of pipelines and large producers to whom these small producers sell. 417 U.S. at 382-83. The small producers were permitted by the Commission to sell gas "at the price the market would bear even though in excess of maximum rates set for producers in pertinent area rate proceedings," and were exempted from any refund obligation. *Id.* at 384. It was claimed by the Commission in *Texaco*, as in the present case, that this action did not constitute deregulation of small producer sales because the FPC would continue to regulate these

---

[3] The fact that the Commission has requested the producers and pipelines to submit certain evidence in rate proceedings held over a year after the 180 day provision terminated does not compensate for the lack of any standards for pipelines to follow *at the time* they were actually determining whether to make the purchases in question. (*See* FPC Petition at 13 n. 9.)

[4] The Commission has yet to disallow a single 180 day sale price paid by a pipeline.

sales through its regulation of pipeline and large producer rates, utilizing the standard of disallowance of that portion of the small producer price which was "unreasonably high." *Id.* at 384-85.

But this Court set aside the Commission's order in *Texaco* because, *inter alia*, it did "not expressly mention the just-and-reasonable standard" (*Id.* at 396), and the real yardstick to be used by the Commission in deciding whether to allow a pass through by a pipeline would be at best "reasonableness" in the unregulated marketplace:

> "It is true that pipeline and large producer costs for new small producer gas were not to be 'unreasonable' but the implication appears to be that reasonableness would be judged by the standard of the marketplace. It is also true that the Commission asserted that it was not deregulating small producer rates, that the Commission 'shall consider all relevant factors' in determining whether proposed rates were consistent with the 'public convenience and necessity,' and that the Commission intended to review new contract prices charged by small producers 'to assure that the reasonableness of the rates charged by such producers pursuant to the action we are taking herein.' But these generalities do not supply the requisite clarity to the order or convince us that it should be sustained." [*Id.* at 396-97.]
>
> * * * *
>
> ". . . [W]e should also stress that in our view *the prevailing price in the marketplace cannot be the final measure of 'just and reasonable' rates mandated by the Act.*" [*Id.* at 397 (emphasis supplied).]

The Court noted that the reason why the unregulated market price is not the equivalent of the just and reasonable rate under the Act is because ". . . Congress considered that the natural gas industry was heavily concentrated and that monopolistic forces were distorting

the market price for natural gas" (*Id.* at 397-98; footnote omitted). If the natural gas industry was anticompetitive when the Natural Gas Act was passed such that there existed no identity between the market price and the just and reasonable price, then certainly in a time of supply deficiency such as the present when the interstate market is at the mercy of the gas producers, there exists even greater reason to reject any possible correlation between the unregulated market price and the just and reasonable rate.

Thus, the Commission's Order No. 491 must fall, as the court of appeals held, not only because of unlawful deregulation of producers, but also because of the utilization of an unacceptably loose and ambiguous standard of rate regulation for pipelines.

3. In spite of all of the foregoing, the Commission wishes this Court to review the decision of the court of appeals below because it wants to have this Court conclude that the portion of the proviso to Section 7(c) of the Natural Gas Act which states that the Commission "may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest," permits this deregulation of producer rates for 180 day sales, which cover an entire winter heating season. The Commission specifically takes issue with the court of appeals' "narrow construction" (App. A at 19a) of this exemption provision, relying on this Court's statement in *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968), that "the Commission's broad responsibilities therefore demand a generous construction of its statutory authority." (*See* Commission Petition at 10.)

But the court of appeals' review of the legislative history of Section 7(c) reveals that the Commission has misplaced the emphasis on which portion of Section 7(c) is to be read broadly. The proviso to Section 7(c) con-

tains another clause which grants the Commission the authority to "issue a temporary certificate in cases of emergency." Both of these clauses of the one sentence proviso were passed together by Congress as a "slight amendment" to the remainder of Section 7(c) which was approved at the same time as part of the same bill and which extended the certification requirement to "all cases as a condition precedent to engaging in transportation or sale of natural gas subject to the jurisdiction of the Commission." (App. A at 14a.) [5] And the "temporary emergency" clause has been interpreted by the courts to apply only to "a narrow class of situations." (App. A at 13a.) [6] Furthermore, this Court has ordered refunds of excess amounts collected by producers under temporary, emergency certificates granted under the Section 7(c) proviso.[7]

Thus, the thrust and purpose of Section 7(c) is to include as many situations as possible within the FPC's certificate authority and to provide for a close scrutiny of all rates charged,[8] and the proviso was attached to the same bill to authorize temporary certificates in emergencies and to permit temporary acts on a small scale which are of such a nature that "the issuance of a certificate will not be required in the public interest." The court of appeals, therefore, correctly concluded that "§ 7 must be given a broad reading, and the exemption a narrow construction in light of the overall purpose of § 7 to provide a scrutiny needed in the public interest." (App.

[5] *See* H.R. Rep. No. 1290, 77th Cong., 1st Sess. (1941) at 2.

[6] Pennsylvania Gas and Water Co. v. FPC, 138 U.S. App. D.C. 298, 304, 427 F.2d 568, 574 (1970); *accord*, Algonquin Gas Transmission Co. v. FPC, 201 F.2d 334, 339-41 (1st Cir. 1953).

[7] Federal Power Commission v. Sunray DX Oil Co., 391 U.S. 9, 43-45 (1968); United Gas Improvement Co. v. Callery Properties, 382 U.S. 223, 229-30 (1965).

[8] Atlantic Refining Co. v. Public Service Comm'n, 360 U.S. 378 (1959).

A at 19a.) Since the express purpose of Order No. 491 was to elicit large volume sales to the interstate market, the exemption contained in the proviso to Section 7(c) will not serve to shield such sales from the Commission's statutory duty to regulate producer rates.

4. In the final analysis, the Commission's action in deregulating 180 day sales by producers is not only unlawful, but it also results in a situation which only perpetuates the shortage of gas supplies being placed on the interstate market by producers. In the first place, as noted in footnote 2, *supra*, since Order No. 491 applies to offshore gas in the Federal domain, which may only be sold interstate, as well as to onshore gas, it allows unregulated prices for gas which is not in competition with the intrastate market. Secondly, the allowance of unregulated rates for a six-month commitment of gas provides a great disincentive to long-term commitments of gas to the interstate market at regulated rates. This expectation of possible deregulation definitely makes a producer pause before making an indefinite commitment of its gas to interstate customers at just and reasonable rates. Furthermore, as noted above, since the just and reasonable rate for producers is set in appropriate area rate proceedings and since virtually all major interstate pipelines are experiencing curtailment, the only rationalization for allowing a price over the just and reasonable rate will be simply that there is a gas shortage. And this supplies quite an incentive for producers to perpetuate such a shortage.

5. The Commission begins its argument in support of its petition for certiorari by asserting that "[t]his case presents an important issue" concerning the FPC's authority to adopt emergency measures in a time of a gas supply deficiency. (Commission Petition at 8.) However, the "measure" in question, i.e., 180 day non-certificated, unregulated sales, although not moot because of the re-

maining question of producer refunds, certainly is not one which is of such importance that this Court should review it since, in addition to its patent illegality, it expired on March 15, 1974, and the Commission made no attempt to revive it during the winter heating season of 1974-75. In addition, as shown *supra*, the issues presented to this Court in this case have already been determined by this Court last year in its *Texaco* opinion.

What the Commission really seeks is an advisory opinion by this Court as to the limit of the measures the Commission may take to circumvent the requirements of the Natural Gas Act in order to achieve *de facto* deregulation of the interstate market. But the Court has already responded to this request as well in *Texaco*:

> ". . . the Act makes unlawful all rates which are not just and reasonable, and does not say a little unlawfulness is permitted." [417 U.S. at 399.]

CONCLUSION

The petition for a writ of certiorari should be denied. Order Nos. 491, 491-A, 491-B, and 491-C permit the unlawful deregulation of the rates charged by producers for 180 day sales of gas, both offshore and onshore since producers are exempted from any possible refund liability; the standard utilized to review the inclusion of the rates paid by pipelines in the pipelines' own rates under this procedure falls far short of the just and reasonable requirement of Sections 4 and 5 of the Natural Gas Act; the legislative history and judicial precedent are clear that the proviso to Section 7(c) of the Act is much too narrow to encompass the deregulation of rates for all producer sales of up to 180 days duration; the issues presented are ones which this Court has previously reviewed and decided against the Commission in *Texaco*; and the 180 day procedure here involved was voluntarily terminated by the Commission even before the court of

appeals struck it down. In short, there is no compelling reason for this Court to review the eminently correct conclusion of the United States Court of Appeals for the District of Columbia Circuit that the 180 day procedure adopted in Federal Power Commission Order No. 491 is unlawful and must be set aside.

Respectfully submitted,

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FEDERAL POWER COMMISSION, *Petitioner*

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MEMORANDUM OF ASSOCIATED GAS DISTRIBUTORS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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MEMORANDUM OF ASSOCIATED GAS DISTRIBUTORS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Associated Gas Distributors group (AGD), a party below, submits this response in support of the Government's Petition for a Writ of Certiorari filed by the Solicitor General, on behalf of the Federal Power Commission. AGD concurs with the reasons set forth in the Government's Petition that the Court of Appeals decision incorrectly restricts the Federal Power Commission's authority to permit pipelines experiencing system shortages to make emergency purchases of natural gas for a 180-day period without Commission certification under Section 7(c) of the Natural Gas Act, 15 U.S.C. 717f(c). The purpose of this Memorandum is to underscore the critical need for short-term emergency purchases of the type that had been authorized by the Commission under its Order 491.

STATEMENT OF THE CASE

AGD is an unincorporated association of 45 natural gas distribution companies, the members of which are listed on the inside front cover of this Memorandum. These companies provide gas utility service to approximately 11 million consumers in most of the major market centers in the eastern portion of the United States. As utilities, the AGD companies bear the legal responsibility of maintaining adequate natural gas service to these customers at reasonable rates. These companies obtain substantially all of their natural gas supplies for this service from several major interstate pipeline companies. Most of AGD's pipeline suppliers are projecting massive levels of curtailment this coming winter which will have a serious adverse impact on both the AGD companies and the consumers they serve. The extent of the anticipated curtailments, and the need for the 180-day emergency sales to ameliorate the impact of such curtailments, is discussed below.

1. Emergency Measures Are Needed To Prevent Curtailments To Highest Priority Customers This Winter.

The natural gas shortage which this Court characterized as "serious and growing"[1] one year ago, has "now reached devastating proportions"[2] according to the Federal Power Commission. On June 6, 1975, the FPC released a staff report showing actual net curtailments of firm service by interstate pipelines totaling 2,013 billion cubic feet (Bcf) during the 12 months April 1974–March 1975. This was a 69 percent increase in curtailments in just one year. Curtailments for the coming

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[1] Mobil Oil Corp. v. Federal Power Commission, 417 U. S. 283, 320 (1974).

[2] Columbia Gas Development Corp., 51 FPC ____, Opinion No. 705, mimeo ed. 4 (September 11, 1974).

year ending March 1976 are projected to be 2,917 Bcf. The increase in curtailments during the critical winter period has been even more severe. The FPC report stated that during the most recent winter heating season, November 1974 through March 1975, actual net curtailments by 27 major interstate pipelines totalled 1,019 Bcf - a 130 percent increase over the previous winter. For the coming winter heating season, net curtailments of firm service are projected at 1,327 Bcf, nearly three times greater than the 1973-74 winter.

Curtailment of deliveries by pipelines serving the AGD service area in the eastern portion of the United States have been particularly severe. In the past year, the Commission found that emergencies existed on the systems of the Transcontinental Gas Pipeline Corporation (Transco) and the Tennessee Gas Pipeline Company (Tennessee) –two of the largest pipelines serving the AGD companies.[3] In a status report recently submitted to the Federal Power Commission on August 8, 1975, the situation on the Transco System for the upcoming winter season was described by the Administrative Law Judge as a "disaster area."[4] Curtailments by Transco and other eastern pipelines may well cause many industrial users to lose all or a significant portion of their winter period natural gas supplies. This will cause a substantial decrease in several types of manufacturing activity, with the closing of many plants a serious possibility. These cutbacks will reduce production of many vital goods and cause additional unemployment.

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[3] *See, e.g.*, Order Finding an Emergency on Transco System, FPC Docket No. RP72-99, mimeo ed. 8 (November 12, 1974); the Commission declared that an emergency existed on the Tennessee system in an Order issued in Docket No. CI75-466, mimeo ed. 3 (February 7, 1975).

[4] Transcontinental Gas Pipeline Corporation 1975-1976 Winter Season, Presiding Administrative Law Judge's First Status Report. Docket No. RP72-99, mimeo ed. 1. Transco's curtailment is expected to rise sharply to approximately 43 percent of firm requirements this winter, a percentage which–in terms of the Commission's Order No. 467(b) priorities–would completely eliminate service to priorities 2-9 and even cut six percent into the highest priority 1.

2. The 180-Day Emergency Sales Procedure Would Provide Urgently Needed Supplies

The 180-day emergency sales procedure is a mechanism whereby substantial increases in interstate gas supplies could be realized in a short period of time. Because of the significant difference between the FPC-established nationwide price ceiling for interstate sales, and the higher market price for unregulated-intrastate sales, producers are reluctant to sell new onshore gas supplies to the interstate market.[5] However, experience has shown that producers will sell significant quantities of gas to the interstate market on a short-term, 180-day basis, pending the completion of facilities or other events necessary to deliver gas to an unregulated intrastate buyer. Although such sales are at prices in the $1.00 to $2.00 per Mcf range – substantially above the 52-cent regulated price ceiling for new, long-term sales–these prices compare favorably with the few alternatives available to consumers dependent on the interstate gas market. Extremely limited supplies of substitute (manufactured) natural gas (SNG) and liquefied natural gas (LNG) are available at prices in the range of four to six dollars per Mcf – up to three times more expensive than the most expensive natural gas supply. Thus, unless the interstate pipelines are permitted to make 180-day emergency sales this winter to elicit additional gas supplies, there will be both enormous reductions in service *and* higher consumer costs attributable to the purchase of SNG and LNG. In this emergency situation, a procedure authorizing 180-day emergency sales at competitive prices is in the public interest.

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[5] In the past four years, interstate pipelines have been unable to acquire virtually any new gas from onshore areas, while the intrastate reserve additions have grown to an average of 8.6 Tcf per year; 29 times the total interstate additions. Statement of John N. Nassikas, Chairman, Federal Power Commission, Hearings before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Cong., 1st Sess. 19, July 14, 1975. The interstate market is thus dependent on the offshore federal domain for substantially all of its new gas supplies. The rapidly growing level of interstate curtailments results from the fact that offshore production alone cannot meet the needs of the interstate market.

CONCLUSION

For the foregoing reasons, and those set forth in the Government's Petition, AGD respectfully requests this Court to grant the Petition for a Writ of Certiorari, and hear this case on an expedited basis.

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September 16, 1975

I, Frederick Moring, hereby certify that I have served three copies of the foregoing Memorandum for Associated Gas Distributors upon each of the parties to this proceeding by causing said copies to be placed in the United States mail, postage prepaid.

This 16th day of September 1975.

Frederick Moring

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-227

FEDERAL POWER COMMISSION, *Petitioner*
v.
CONSUMER FEDERATION OF AMERICA, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF TEXAS GAS TRANSMISSION CORPORATION AND TRANSCONTINENTAL GAS PIPE LINE CORPORATION IN CONDITIONAL SUPPORT

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BRIEF OF TEXAS GAS TRANSMISSION CORPORATION AND TRANSCONTINENTAL GAS PIPE LINE CORPORATION IN CONDITIONAL SUPPORT

Texas Gas Transmission Corporation (Texas Gas) and Transcontinental Gas Pipe Line Corporation (Transco), parties to the proceedings in the court below, hereby submit this brief in conditional support of Petitioner.

TEXAS GAS AND TRANSCO

Texas Gas is a corporation organized and existing under the laws of the State of Delaware. It is a natural gas company as defined in Section 1(b) of the Natural Gas Act and, as such, is engaged in the business of transporting and selling natural gas in interstate commerce under authorizations granted by the Commission. The facilities operated by Texas Gas, as a natural gas company, consist primarily of a pipeline system located in Texas, onshore and offshore Louisiana, Arkansas, Mississippi, Tennessee, Kentucky, Indiana, Illinois and Ohio.

Transco is a corporation organized and existing under the laws of the State of Delaware. It is a natural gas company as defined in Section 1(b) of the Natural Gas Act and, as such, is engaged in the transportation and sale of natural gas in interstate commerce by means of its natural gas transmission system extending from its sources of gas supply in Texas, Louisiana and Mississippi through the States of Alabama, Georgia, South Carolina, Virginia, Maryland, Pennsylvania and New Jersey to its termini in the Metropolitan New York area.

Both Texas Gas and Transco fully participated as intervenors in the proceedings before the court of appeals.

QUESTIONS PRESENTED

1. Whether the Commission possesses the legal power under Sections 7(c) and 16 of the Natural Gas Act, 15 U.S.C. 717f(c), 717o, to exempt, from rate and certificate regulation, short-term emergency sales of natural gas that would otherwise be sold in the intrastate market in order to forestall the

rapidly decreasing supplies of natural gas available to the interstate market and the concomitant increase in interstate pipeline curtailments of high-priority markets?

2. If not, may the Commission exempt such sales from rate and certificate regulation by indirectly regulating such rates in rate proceedings of the purchasing pipelines: (a) when the pipelines "are given no guidance whatsoever as to what the standards may be" *(FPC* v. *Texaco Inc.)* and (b) when the exemption will be counter-productive since neither the pipeline nor the producer will enter into such transactions under these circumstances?

STATEMENT

A. Background

Section 7(c) of the Natural Gas Act, as amended, provides that the Commission "may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest." Pursuant to that enabling provision, the Commission's Regulations have, for many years, provided for exemption of temporary acts and operations by natural gas companies from certain certification requirements of the Act. The term "temporary acts or operations" was consistently interpreted as including sales in interstate commerce by producers to pipelines for resale. Prior to the issuance of Order No. 491, *et seq.* (FPC Pet., pp. 33a-109a), however, such exemptions were available only where the acts or operations were limited to a period of not more than 60 days. Order No.

491 extended the period during which the emergency sections could be invoked to 180 days.

Recently, the exemption provisions have been increasingly utilized on a widespread basis due to the nationwide natural gas shortage. Pipelines experiencing gas supply emergencies have made "spot" purchases for the 60 or 180 day exemption period in order to supplement dwindling reserves. Under Section 2.68 of the Commission's Regulations, distribution companies have also engaged in exempt 60 day sales among themselves. In addition, pipelines have contracted for "limited-term" purchases pursuant to Order No. 431, 45 FPC 570 (1971), by which producers apply for limited-term certificates (generally for 1 to 2 year periods), with pre-granted abandonment, for sales at rates in excess of the "just and reasonable" ceiling then applicable to long-term sales in the Commission pricing area in question. Although these prices were higher than the appropriate "just and reasonable" rates, these rates became *legal* rates which the pipelines were authorized to pay without exposure to later disallowance of any portion of such expenses from their costs of service.

The severe shortage of natural gas has intensified the competition for available long-term and short-term supplies. Pipelines are attempting to attract gas away from the unregulated intrastate market. It is common knowledge, however, that prices in the intrastate market are at least two or three times the price set by the Commission for interstate sales. In order to secure gas that would otherwise be sold in the unregulated intrastate market at prices in excess of federally-controlled rates, the Commission, through its exemption regulations, relieved producers from the constraint of area rate ceilings in the hope that interstate pipelines would thereby be able to compete effectively with intrastate purchasers for such scarce supplies. It is in this context, then, that the Order No. 491 series must be considered.

B. Proceedings Before the Commission

On September 14, 1973, the Commission issued Order No. 491 (FPC Pet., pp. 33a-41a) which extended from 60 days to 180 days the period of time that a pipeline experiencing a system shortage could make emergency purchases of natural gas absent Commission certification under Section 7(c) of the Act. The order was designed to avert significant economic and social dislocations that would result from the severe supply deficiency projected for the 1973-1974 winter season. The amendments were to expire at the conclusion of the winter season on March 15, 1974.

The Commission, in Order No. 491-A (FPC Pet., pp. 42a-75a) dated September 25, 1973, denied motions for stay of Order No. 491 and reiterated the necessity of extending the emergency regulations in order to augment the available gas supply for the interstate market during the critical heating season. However, the Commission also indicated *for the first time* that "[t]he rate at which these emergency volumes are committed to interstate pipelines will be examined in our pipeline regulatory review under Sections 4 and 5 of the Act, in the same manner as purchases are reviewed under the prior emergency procedures."[1] (FPC Pet., p. 52a)

[1] While the Commission's statement implies that emergency purchases had previously been reviewed by the Commission in the same manner as here proposed, neither Texas Gas nor Transco had any prior knowledge of any such review of emergency purchases or, for that matter, any prior hint that such "indirect" review was ever contemplated or intended by the Commission.

In response to written comments filed by various parties, the Commission issued Order No. 491-B (FPC Pet., pp. 76a-104a) on November 2, 1973, and again reaffirmed its policy of permitting 180 day emergency sales. The Commission amplified its position with respect to "indirect" review of emergency sales in the following manner:

> "As we indicated in Order No. 491-A (*mimeo* at 8), we will scrutinize the rates of all emergency purchases in the review of purchased gas costs in pipeline rate proceedings, including purchased gas [footnote omitted] adjustment clause increases. We will permit the pipeline to pass on to the consumer the rates of emergency purchases *only* when such rates can be shown to have been required by the public interest." (Emphasis in original.) (FPC Pet., p. 91a)
>
> * * *
>
> "Should we determine in a pipeline rate case that any emergency purchase was improvidently consummated at a rate which was more than necessary to secure the gas for the interstate market, we will not require refunds by the producer." (FPC Pet., p. 92a)

The Commission denied rehearing and stay on November 21, 1973, in Order No. 491-C (FPC Pet., pp. 105a-109a). Pursuant to applications for stay filed by interested parties, the court of appeals granted a stay of the Commission's orders on December 10, 1973. The stay, however, was later vacated by this Court on December 20, 1973 (414 U.S. 1117).

C. The Decision Below

The court of appeals determined that the action taken by the Commission was outside the scope of its authority under Section 7(c) of the Act and, thus, set

aside the orders (FPC Pet., pp. 1a-30a). In analyzing the legislative history and the purpose of Section 7, the court concluded that the exemption proviso contained therein did not enable the Commission to exclude the short-term emergency sales authorized in Order No. 491 from the certification process.

Citing *FPC* v. *Texaco Inc.,* 417 U.S. 380 (1974), the court below held that the Commission's orders did not constitute a valid means of *indirect* regulation because there was no assurance that the rates "paid by pipelines" (FPC Pet., p. 22a) to producers would be just and reasonable. The court also indicated that the standard for indirect regulation did not guarantee, as required by its reading of *Texaco,* that "the rates 'ultimately borne by the consumer are just and reasonable.' " (FPC Pet. p. 25a)

The indirect regulatory scheme was further deemed inadequate for its failure to articulate standards to guide pipelines in contracting for emergency purchases. As the court noted:

> "In *Texaco* the Court was concerned with the *squeeze on the pipelines* which stemmed from making payments that would be both disallowed and nonrefundable, and made it clear that any such program would require *'guidance'* for those that might be affected. [footnote omitted] *The warning in Order 491 against 'improvident' contracts does not provide adequate guidance to protect the pipelines."* (Emphasis added.) (FPC Pet., p. 26a)

D. Commission Action Subsequent to Order No. 491

Because of the uncertainty surrounding the validity of the 180 day exemption, the Commission terminated the program on March 15, 1974. However, the Com-

mission has continued to recognize the need for attracting intrastate supplies into the interstate market. First, it sought and obtained an expedited decision in this case from the court below in a vain effort thus far to reinstitute the 180 day exemption. Second, the Commission recently (August 28, 1975) promulgated Order No. 533 which announced the Commission's willingness to certificate transportation arrangements by interstate pipelines on behalf of their high-priority industrial customers. The purpose of such policy is to allow industrial users to purchase gas *directly* from producers *at prevailing market prices* and, therefore, to "compete with the producer's intrastate customers for gas supplies not otherwise available to the interstate market." The Commission's rate jurisdiction would not attach to such direct sales because Section 1(b) of the Act only authorizes the Commission to regulate *sales for resale.*

On June 17, 1975, the Commission issued the first of a series of orders (see, e.g., *Texas Gas Transmission Corporation*, Docket No. RP74-25, *et al.*) concerning the 180 day purchases made by interstate pipelines pursuant to Order No. 491. The various orders set procedural schedules for the convening of public hearings so that the producer and the pipeline could justify the justness and reasonableness of the rates for all emergency sales consummated in excess of the 51-cent nationwide rate. Despite the fact that the Commission did not list any meaningful standards in Order No. 491 to guide pipelines in contracting for emergency purchases, these later orders compelled the submission of evidence pertaining to, *inter alia,* the producer's individual costs, the pipeline's need for the gas and the availability of other gas supplies (see p. 15, *infra*).

THE POSITION OF TEXAS GAS AND TRANSCO

Texas Gas and Transco are fully in accord with the Commission's announced intention of securing additional gas for the interstate market by means of its emergency regulations. However, it is unnecessary and, in fact, unlawful to uphold the validity of the emergency provisions on the basis of indirectly regulating the producer prices at the pipeline level. We support the Commission's petition for a writ of certiorari but only to the extent that the emergency exemption is permissible without a subsequent rate review at the pipeline level.

Inasmuch as there were no standards prescribed in Order No. 491 to guide pipelines in making emergency purchases, it seems clear under *Texaco, supra,* that the same defects are present in Order No. 491 as in that case. A contrary conclusion would entail the retroactive imposition of *ex post facto* Commission guidelines. The court below, as did this Court in *Texaco,* perceptively took cognizance of the unlawful "squeeze" on the pipelines resulting from the lack of adequate standards (FPC Pet., p. 26a).

The major thrust of our participation in the instant case, however, is directed to the legal parameters which must circumscribe future Commission actions involving emergency interstate sales. If properly enacted, such future regulations will provide a viable means for interstate pipelines to alleviate their serious supply deficiences. We believe that the Commission possesses the requisite authority under the Natural Gas Act to exempt short-term emergency sales to curtailing interstate pipeline companies from rate and certificate jurisdiction.

We submit that the prevailing ("in line") market price provides the only appropriate test to be used in satisfying the requirements of the Natural Gas Act in making the 180-day exemption a viable vehicle for the acquisition of additional interstate gas. It must be remembered that the emergency provisions were adopted by the Commission to procure gas *not otherwise available to the interstate market.* If a producer has the option of selling its gas in the unregulated intrastate market, the only relevant consideration should be, as far as the Commission is concerned, the determination of the price required to entice the producer to sell his gas in the interstate market. The choice for interstate pipelines, and the interstate market in general, is not between gas priced at one level vs. gas priced at a different level but rather *gas priced at the prevailing market level* vs. *no gas at all.* Emergency provisions not attuned to this fact of life will only ensure that essentially all onshore gas will continue to be sold in the intrastate market.

ARGUMENT

A. The Commission Has the Legal Power To Exempt Short-Term Interstate Sales of Natural Gas from Rate and Certificate Regulation During Periods of Emergency.

The exemptive authority contained in Section 7(c) of the Act affords a proper legal foundation for Commission suspension of rate and certificate jurisdiction with respect to *short-term* emergency sales of natural gas. Confronted with an acute shortage of new supplies and rapidly escalating curtailments of high-priority markets by interstate pipelines, the Commission has resorted to extraordinary, and yet necessary, measures to cope with this crisis. The powers of the Commission in this area, therefore, must be generously

construed to enable the Commission to fulfill its pressing responsibilities under the Act. *Permian Basin Area Rate Cases,* 390 U.S. 747, 776 (1968).

In order to attempt to maintain adequate service to existing interstate consumers, the Commission is certainly justified in exempting emergency sales on a *temporary* basis. Unlike *Texaco,* which involved the *permanent* certification of small producer sales, the emergency provisions contemplate transactions of a *short-term* nature only and, hence, fall within the confines of the exemption proviso in Section 7(c).

B. The Prevailing Market Price Provides an Appropriate Standard that Fully Satisfies the Dictates of the Natural Gas Act.

As conceived by the Commission, the principal purpose of Order No. 491, and presumably of any future emergency regulation, was to secure, for the interstate market, gas that would not otherwise be available to interstate consumers. In pursuit of this laudatory goal, the Commission authorized and, indeed, encouraged interstate pipelines to compete with prospective intrastate purchasers for reserves that would ordinarily be sold in the intrastate market. We cannot overemphasize the very basic maxim that, unless interstate pipelines are able and willing to offer a price competitive with the existing rate in the intrastate market, the gas will not be obtained. Indeed, the whole point in the Commission's issuance of Order 491 was to free the pipelines from the price constraints of existing area ceilings. Otherwise, there would have been no purpose in the issuance of such an order. This fact was recognized by the court below:

> "The entire point of Order 491 is to free 'pipelines facing emergencies' from price constraints to 'en-

able them to secure substantial gas supplies which might otherwise be lost to the intrastate market or interstate pipelines not facing an emergency.'" (Footnote omitted.) (FPC Pet., p. 25a)

Given this simple fact of life and coupled with an *interstate* gas shortage of enormous proportions, we submit that a rate that is first, "in-line" (*CATCO, infra*) with prevailing market prices, and second, able to elicit the additional supplies, satisfies the requirements of the Act for short-term emergency purchases. To hold otherwise would be to engage in the naive notion that the Commission must establish a rate for short-term onshore sales at a level *beneath* the prevailing market price. The Commission would then be establishing a rate at which *not* one additional cubic foot of gas would be sold in the interstate market. It is inconceivable that regulation of this type produces any benefits whatsoever for high-priority interstate customers desperate for new sources of natural gas.

Inasmuch as *Texaco* dealt with small producer sales of *permanent* duration, this Court's admonition that "all gas rates [must] be just and reasonable" would not appear to be applicable to the *temporary* emergency sales discussed herein.[2] In *Atlantic Refining Co.* v. *Public Service Commission of the State of New York* (CATCO), 360 U.S. 378 (1959), for instance, this Court stated that the Act does not compel a determination of just and reasonable rates for *initial* sales made pursuant to a certificate issued under Section 7(c).

[2] Even if the rates for emergency sales have to be "just and reasonable", the prevailing market price standard would still be applicable because it is the only standard that will elicit *any* onshore supplies away from the unregulated intrastate market and, therefore, under such circumstances, the "prevailing market price" must be considered as the "just and reasonable" rate.

Thus, the rates paid by pipelines for emergency purchases should be adjudged excessive only in the event that such rates are "out of line" with prevailing prices in the area. *See CATCO,* 360 U.S. at 391.[3] Only the "in-line" prevailing market price standard will ensure compliance with the appropriate statutory requirement and, at the same time, provide a means of acquiring the sorely needed gas supplies for the interstate market. Therefore, we urge this Court to approve utilization of such standard in the Commission's determination of the propriety of the rates agreed to by interstate pipelines and producers in connection with emergency sales.

C. Contrary to This Court's Decision in Texaco, Order No. 491 Provided Absolutely No Standards To Guide Pipelines in Making Emergency Purchases.

The court of appeals rightly concluded, pursuant to the doctrine espoused in *Texaco,* that Order No. 491 unlawfully neglected to establish standards by which pipelines could be guided in the consummation of em-

[3] It is interesting to note that while the court below placed considerable emphasis on *CATCO* in reversing Order No. 491, certain significant factors upon which the 1959 decision was premised are no longer valid today: (1) the pipeline had not demonstrated a need for the gas; (2) the producers had not shown the availability of the intrastate market as an outlet for their gas; and, (3) the sales would only have been profitable in the interstate market where 90% of all gas was then being sold. 360 U.S. at 393-394. In contrast, in 1973 production for interstate use represented less than 63% of total production in the lower 48 states. More importantly, in the most recent four years for which data are available (1970-1973), interstate pipelines have acquired only about 8% of national reserve additions, including offshore reserves, which demonstrates vividly the inability of interstate pipelines to compete for market priced intrastate supplies. Source: FPC Staff Report: "A Realistic View of U.S. Natural Gas Supply," December, 1974.

ergency sales contracts. As the court below aptly remarked:

> "A related shortcoming is the Commission's failure to provide pipelines with standards to guide them in latitude contemplated in contracting for emergency purchases. Under Order 491, if pipelines pay too much for gas supplies, they may incur expenses that are nonrefundable. In *Texaco* the Court was concerned with the *squeeze on the pipelines* which stemmed from making payments that would be both disallowed and nonrefundable, and made it clear that any such program would require 'guidance' for those that might be affected. The warning in Order 491 against 'improvident' contracts does not provide adequate guidance to protect the pipelines. The Commission attempts to avoid this problem by stating that the procedures are 'purely optional' and that the order does not 'coerce a pipeline into making such purchases.' But a commission seeking to defend an exemption order cannot in this way ignore its responsibility to give guidance to pipelines that accept the Commission's open-door invitation to obtain needed supplies through Order 491 purchases." (Footnotes omitted.) (Emphasis added.) (FPC Pet., p. 26a)

Since the requisite standards are missing, the Commission should be precluded from denying in a pipeline's cost of service any amounts paid to producers with respect to emergency sales which are required to obtain the gas for the interstate market. Otherwise, interstate pipelines will be held accountable, unjustifiably, for emergency purchases on the basis of retroactively applied standards.

Although Order No. 491 terminated on March 15, 1974, it was not until June 17, 1975, in *Texas Gas Transmission Corporation,* Docket No. RP74-25, *et al.,* that the Commission first suggested criteria that would be used to evaluate the prices paid for emergency gas. The injection of such *ex post facto* standards into pipeline rate proceedings involving Order No. 491 transactions is patently at odds with the most basic due process considerations. Because these standards might be employed in the future, however, it is appropriate to set forth the Commission's statement regarding the evidence that must be furnished in these proceedings. In *Texas Gas Transmission Corporation,* for example, the Commission ordered the following data to be submitted:

> "Cost evidence relating to the producer sales under Order No. 491 can clearly provide the basis for 'just and reasonable' rate findings. *F.P.C.* v. *Texaco Inc.,* 417 U.S. 380 (1974). It follows then, that the producer should introduce relevant evidence of the cost involved in its sale. Such evidence shall be considered together with all other material evidence which would support a finding of a just and reasonable rate in excess of the national rate [51 cents per Mcf].
>
> The cost evidence submitted by the producer should include, *inter alia,* the direct and indirect costs, including the cost of all capital funds reasonably allocated to its sale. In addition, the producer should indicate the price for which the subject gas is now being sold, whether in intrastate or interstate commerce.
>
> The pipeline should submit evidence as to (1) its need for the gas, (2) the availability of other gas supplies, (3) the amount of gas purchased from the producer involved under the emergency provisions of Order No. 491, as amended, (4) the rates of other producer sales under Order No. 491

approved for flow through, and (5) the prevailing prices in the area for both interstate and intrastate sales of gas."

The above-mentioned "guidelines" are hopelessly vague; there is no indication as to the relative weight to be accorded to the various pieces of evidence. Given these imprecise guidelines, the risk of possible Commission disallowance of prudently incurred purchased gas costs is too severe and will undoubtedly deter the pipeline and the producer from executing a contract for the scarce supplies.

It is evident that the criteria suggested in *Texas Gas Transmission Corporation, supra,* are counter-productive. They will discourage producers as well as pipelines from entering into emergency sales agreements. Moreover, the Commission has given no indication of whether, in the event that excess charges are determined, the producer will be required to make refunds or the pipeline will be required to absorb costs already incurred. In either event, under today's conditions, no substantial amounts of emergency gas would be made available. Either the producers will refuse to sell the gas because of the risk of refunds and the ability to sell the gas intrastate with no risk, or the pipeline will refuse to buy the gas because of the potentially enormous risk of cost absorption to its stockholders.

The Texas Gas case provides ample support for our contention that emergency regulations cannot properly be administered pursuant to the guidelines announced therein. In such proceeding, six producers were required to submit voluminous cost data to justify emergency rates in excess of the 51-cent nationwide ceiling.

The total amount of money in question was $21,263; in fact, two of the producers collected revenues of only $462 and $527 above the revenues for comparable volumes priced at the national rate and, yet, were still expected to file the evidence, come to Washington, D. C. for the hearing, and furnish supporting witnesses. To forestall such unnecessary expense and obvious waste of time, Texas Gas reluctantly expressed its willingness to absorb the $21,263 in its rates and, therefore, moved to terminate the proceeding.

A decision by this Court authorizing emergency provisions to operate in the manner suggested by the Commission would result in the classic example of a Pyrrhic victory. The Commission would then issue new emergency regulations encompassing the *Texas Gas* standards—standards under which neither producers nor pipelines would be willing to participate.

CONCLUSION

It is unfortunate that the Commission has not faced the reality that only competitive market prices will elicit emergency supplies for the interstate market and then only if the purchasing pipelines are assured of passing on these prices to their customers. Given the posture in which the Commission presents its petition, i.e., that the prices will be "just and reasonable" under the vague criteria suggested by the Commission, the grant of certiorari and reversal of the court below would not only be clearly contrary to this Court's decision in *Texaco, supra,* but, in addition, would accomplish little, if anything, toward the acquisition of additional gas for the interstate market. However, if the Court is inclined to consider not only the question of Commission power to exempt for 180 day emergencies

but also the question of authority to permit sales and purchases of such gas at market price levels, Texas Gas and Transco would support the grant of certiorari.

Respectfully submitted,

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